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THE DELEGATION OF LEGISLATIVE POWER BY CONGRESS TO THE STATES

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It is an essential theory of our constitutional system that the relations between the Union and the States are determined by the Constitution of the United States, and hence that the powers of the government of the one may be neither increased nor diminished (except in the few instances provided for in the Constitution) by the action of the government of the other. How far this theory has been actually embodied in law it is important to inquire in regard to all three functions of government, legislation, jurisdiction, and administration, but the present discussion will be limited to illustrations of the delegation of legislative power by congress to the States. The acts of congress with which we are here concerned form three distinct classes: those involving the concurrent powers of the States which may be exercised in the absence of conflicting congressional legislation; those involving powers of the States which may be exercised only by reason of some positive action of congress; and, last, a class in which there is an adoption of laws of the States as laws of the United States.

I

Of course when the powers of congress and of the States are clearly concurrent, acts of congress purporting to confer powers on the State legislatures can be regarded as no more than the recognition of powers

already existing in the States, but it may be difficult to determine whether or not an act belongs to this class of legislation.

Of the various acts of congress of this kind that which has caused the most difficulty is the act of the first congress in reference to pilots,¹ which provides that "until further provision is made by congress, all pilots * * * shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose." In the consideration of this act all the principles involved in the delegation of legislative power to the States have been discussed by the courts. Chief Justice Marshall, in commenting on the act in *Gibbons v. Ogden*,² says: "Although congress cannot enable a State to legislate, congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act * * * adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future, presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the States, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. * * * The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary * * * shows, conclusively, an opinion that congress could control the whole subject, and might adopt the system of the States, or provide one of its own." This act and the acts recognizing the validity of State health laws,³ and certain other acts, he thinks show

¹ Act of Aug. 7, 1789, ch. 9, 1 Stat. L. 53, Rev. Stats., sec. 4235.

² 9 Wheat. 1, 6 L. Ed. 23, 73 (1824).

³ Below, p. 375.

an opinion of congress "that the States retain powers enabling them to pass the laws to which allusion has been made."

Does such language not mean that the pilot regulations owe their validity *both* to their adoption by congress and to the inherent powers of the States? In the License Cases,⁴ Chief Justice Taney, while maintaining that "congress had the power, by assenting to the State laws then in force, to make them its own," declares that, "as to all future laws by the States, if the Constitution deprived them of the power of making any regulations on the subject, an act of congress could not restore it," and he bases the validity of the changes in the State legislation made since the passage of this act of congress upon the inherent powers of the States.⁵ This acknowledges in effect a right in the States to annul a law of the United States. This objection was later urged in *Cooley v. Board of Wardens* in the dissenting opinion of Justice McClean,⁶ who had previously held, in the *Passenger Cases*,⁷ that the pilot laws do not derive their validity from the States, but from the act of congress making them laws of the United States, and that hence, on the analogy of the construction of the "process acts,"⁸ any changes in these regulations by the States can have no force in regard to federal action. But in the leading case of *Cooley v. Board of Wardens*,⁹ the court renews the distinction between "the then existing State laws," which are given the force of an act of Congress "so long as they should continue unrepealed by the State which enacted them," and the regulations made subsequent to the act of congress, whose authority is due to the inherent powers of the States. The act of congress is not "an attempt to confer on the States a power to legislation," but "manifests the understanding of congress * * * that the nature of this subject is not such as to require its exclusive legislation."¹⁰ Thus the court in effect justifies the repeal of a law of congress by the action

⁴ 5 How. 504, 12 L. Ed. 256, 290 (1847).

⁵ To the same effect in *Low v. Commrs.*, Charlt. 302, 314 (1830). The difficulty was mentioned, but avoided, in *Hobart v. Drohan*, 10 Pet. 108, 9 L. Ed. 363, 368 (1836), and *The Wave*, Fed. Cas., No. 17, 300, p. 467 (1827-40).

⁶ 12 How. 299, 13 L. Ed. 996, 1006 (1851).

⁷ 7 How. 283, 12 L. Ed. 702, 752 (1849).

⁸ Below, pp. 364-5.

⁹ 12 How. 299, 13 L. Ed. 996, 1004 (1851).

¹⁰ To the same effect in *Banta v. McNiel*, Fed. Cas., No. 996, p. 764 (1871).

of a State. But since this decision was announced the courts have almost always omitted any references to "adoption," which has caused so much confusion; and have either relied entirely on the inherent powers of the States or have upheld the regulations on precedent without giving the grounds of decision. The view is thus expressed in *The Panama*.¹¹ "Neither was the act of 1789 a grant of power from congress to the States. * * * The power is concurrent in the State and national government until exercised by the latter, when so far as exercised it becomes exclusive. If the power was exclusively in the national government, congress could not grant it to the States, and being concurrent it could not or need not." However, the court considers that this view "is in substantial concordance with the doctrine of *Cooley v. Board of Wardens* * * * that the act of 1789 is a mere legislative recognition of the concurrent power of the States over this subject so long as Congress does not act in the matter."¹² But what has been thus gained in consistency in one direction has been lost in another. For the federal courts have always assumed a concurrent jurisdiction in cases arising under such State legislation on account of its maritime character, in direct contradiction of the principle that the admiralty and maritime powers of congress are exclusive. And although the courts at times have attempted to show such action to be consistent, it seems now to be generally admitted that the practice is illogical and to be justified only on account of long usage.¹³

The concurrent power of the States to regulate the militia while under their jurisdiction, recognized at an early period by the courts,

¹¹ Fed. Cas., No. 10, 702, p. 1070 (1861).

¹² To the same effect in *Edwards v. S. S. Panama*, 1 Ore. 418, 424 (1861). See also *Utica v. Churchill*, 33 N. Y. 161, 242 (1865), ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624, 626 (1871); ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, 722 (1879); *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 324 (1881); *The Glencarne*, 7 Fed. 604, 606 (1881); *The Chase*, 14 Fed. 854, 855 (1882). But "adoption" appears again in *Cribb v. State*, 9 Fla. 409, 419 (1861), and *Banta v. McNiel*, above, note 10. In *The Clymene*, 9 Fed. 164, 166 (1881), it is said that the act of 1789 "adopted the existing laws of the States * * * and provided for the adoption of such others as they might thereafter make."

¹³ *Hobart v. Drohan*, 10 Pet. 108, 9 L. Ed. 363, 367 (1836); ex parte McNiel, 13 Wall. 236, 20 L. Ed. 626 (1871); *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654, 663 (1875); *The Manhasset*, 18 Fed. 918, 927 (1884); *Welsh v. North Carolina*, 40 Fed. 655, 656 (1889); *The City of Norwalk*, 55 Fed. 98, 108 (1893).

has been recognized by congress since its enactment of the first statute in reference to the militia. The militia act of 1792¹⁴ provides that "all persons who now are or may hereafter be exempted by the laws of the respective States" shall be exempted from militia duty; and according to the law of 1903¹⁵ "all persons who are exempted by the laws of the respective States or Territories shall be exempted from militia duty." Further the law of 1792¹⁶ provides that the militia of the respective States shall be arranged into divisions, etc., "as the legislature of each State shall direct." Although an opinion of the justices of Massachusetts¹⁷ regards this authority of the States as "the power thus conferred upon the State legislatures by this act of congress" (the justices offer no objection to such *conferring* of power), it would seem that there is here no attempt to delegate power to the States, but only a recognition of an inherent State power.¹⁸ And the same may be said¹⁹ of acts of congress which relate to the State health and quarantine laws²⁰ so far as their general application is concerned.

II

Upon the subjects above considered there is a concurrent power of the States to legislate in the absence of inconsistent federal legislation. But there are other subjects in reference to which legislative powers of the States are held to become operative only on account of some positive action on the part of congress.

The currency act of 1864²¹ directs that nothing in the act shall prevent the shares in any national banking association from being taxed as personal property by the States, but that the State legislatures

¹⁴ Act of May 8, 1792, ch. 33, sec. 2, 1 Stat. L. 271. Cf. Annals of Congress, 1791-3, pp. 418-21.

¹⁵ Act of Jan. 21, 1903, ch. 196, sec. 2, 32 Stat. L. 775.

¹⁶ Act of May 8, 1792, ch. 33, sec. 3, 1 Stat. L. 271, Rev. Stats., sec. 1630.

¹⁷ 22 Pick. 571, 575 (1839).

¹⁸ Cf. *People v. Hill*, 126 N. Y. 497, 505 (1891); 36 Cong. Rec. 779-81 (1903).

¹⁹ *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, 72 (1824); *Brown v. Maryland*, 12 Wheat. 420, 6 L. Ed. 678, 687 (1827); *License Cases*, 5 How. 504, 12 L. Ed. 256, 291 (1847). But see below, pp. 352 and 357.

²⁰ Below, p. 375.

²¹ Act of June 3, 1864, ch. 106, sec. 41, 13 Stat. L. 99, Rev. Stats., sec. 5219.

shall have authority over the matter, subject to certain restrictions. The necessity for this enactment lay in the principle of immunity of instruments of the federal government from State taxation, established in *McCulloch v. Maryland*,²² although opinion in congress was divided as to whether such taxation came within the principle of that decision.²³ Assuming such to be the case, it was there contended that such power of taxation can be exercised by congress alone and cannot be delegated to the States;²⁴ that the States may exercise such a power with the *consent* of congress;²⁵ that such consent "is not conferring any power upon the State, but the general government simply lets go of an exemption" heretofore enjoyed by such instruments; that this power of taxation "does not come by grant from the general government, but it resides in the States."²⁶ The constitutionality of the act was soon contested, but maintained, in *Van Allen v. Assessors*:²⁷ "It is said that congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from congress. We agree to this. But as it respects a subject-matter over which congress and the States may exercise a concurrent power, but from the exercise of which congress, by reason of its paramount authority, may exclude the States, there is no doubt congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the federal and State governments is found in the pilot-laws of the States, and the health and quarantine laws." In applying this decision in *Stetson v. Bangor*²⁸ the State court says: "If the States possess this power at all, it is in virtue of their inherent authority as States of the United States," and not on account of any "enabling act of congress."

A principle previously stated in the dissenting opinion of Chief

²² 4 Wheat. 316, 4 L. Ed. 579 (1819).

²³ Cong. Globe, 1863-4, especially pp. 1393, 1893-9, 1957.

²⁴ *Ibid.*, 1394.

²⁵ *Ibid.*, 1891, 1895-6, 1899.

²⁶ *Ibid.*, 1959. See also *ibid.*, 1957.

²⁷ 3 Wall. 573, 18 L. Ed. 229, 235 (1865).

²⁸ 56 Me. 274, 284 (1868).

Justice Chase in *Van Allen v. Assessors*,²⁹ was developed further by Justice Miller for the court, in *National Bank v. Commonwealth*.³⁰ The principle of *McCulloch v. Maryland* "has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government." It would thus seem that even under the interpretation of the Constitution in *McCulloch v. Maryland*, the States possess an inherent power to impose this tax, and that the act of congress was wholly unnecessary in this respect. But the same judge, in delivering the opinion of the court in *People v. Weaver*,³¹ says that this provision "was necessary to authorize the States to impose any tax whatever on these bank shares," and speaks of congress as "conferring a power on the States which they would not have otherwise had," as "permitting the States to tax these shares." And the supreme court continues to speak of this "consent of congress," of this "grant" to the States, of this "permissive legislation of congress."³² We have thus much confusion of thought, which is found also in reference to other acts of congress embodying the same principle.

Although, under the doctrine of the decisions in *McCulloch v. Maryland*³³ and *Weston v. Charleston*,³⁴ the obligations of the United States may not be taxed by the States, it has been until recently the practice of congress expressly to exempt such obligations from State taxation.³⁵ But a change in policy came with an act of 1894,³⁶ whereby national

²⁹ 3 Wall. 573, 18 L. Ed. 229, 238 (1865). See also *Utica v. Churchill*, 33 N. Y. 161, 242 (1865).

³⁰ 9 Wall. 353, 19 L. Ed. 701, 703 (1869).

³¹ 100 U. S. 539, 25 L. Ed. 705, 706 (1880).

³² *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196, 199 (1875); *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 901 (1887); *Talbot v. Silver Bow Co.*, 139 U. S. 438, 35 L. Ed. 210 (1891); *Owensboro Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 852 (1899).

³³ 4 Wheat. 316, 4 L. Ed. 579 (1819).

³⁴ 2 Pet. 449, 7 L. Ed. 481 (1829).

³⁵ E.g., Act of Feb. 25, 1862, ch. 33, sec. 2, 12 Stat. L. 345; Act of July 14, 1870, ch. 256, sec. 1, 16 Stat. L. 272.

³⁶ Act of Aug. 13, 1894, ch. 281, sec. 1, 28 Stat. L. 278.

bank notes, legal tender notes, etc., are declared to be, with certain restrictions, "subject to taxation * * * under the laws of any State or Territory." Of course the principle involved in this act is precisely the same as that in the taxation of shares of national banks. The constitutionality of the former act has apparently never been questioned in the courts, doubtless on account of the decisions in reference to the latter, but the discussions in congress on the two bills were very similar.³⁷

The same principle and the same difficulties are present in several acts relating to the regulation of interstate commerce. The first of these, enacted in 1866,³⁸ specifies that the provisions of the act regulating the transportation of certain explosives shall not be construed to prevent the States, Territories, or localities from regulating or prohibiting the transportation of these substances within their respective limits or from prohibiting their introduction into such limits for sale, use, or consumption therein. This act has aroused little interest and has been discussed only by way of illustration of other similar laws. In *ex parte Jervey*³⁹ the court, after declaring that, the power to regulate interstate commerce being vested in congress, "it is within the power of congress to permit its exercise in whole or in part by the States," remarks that by the provisions of this act, "congress gives directly to any State * * * the right to prohibit the introduction of such substances for sale, use, or consumption therein," but at the same time inconsistently quotes from *Rahrer's case*⁴⁰ to the effect that the Wilson act "gives the States no new power." It has been maintained in congress that the provision in reference to explosives was unnecessary because of the States' inherent right to protect

³⁷ 26 Cong. Rec. 7140, 7145, 7170-1, 8209. By the act of 1864 (sec. 30, Rev. Stats., sec. 5197), the national banks are allowed to take interest "at the rate allowed by the laws of the State, Territory, or district where the bank is located." Although the prospective operation of this bill was recognized in congress; there was no contention as to delegation of power, and the validity of State laws passed after this act has often been assumed by the courts, or no comparison of dates made. E.g., *Tiffany v. National Bank*, 18 Wall. 409, 21 L. Ed. 862 (1873); *La Dow v. First National Bank*, 37 N. E. (Ohio) 11 (1894); *Schlesinger v. Gilhooley*, 81 N. E. (N. Y.) 619 (1907).

³⁸ Act of July 3, 1866, ch. 162, sec. 5, 14 Stat. L. 81, Rev. Stats., sec. 4280.

³⁹ 66 Fed. 957, 960 (1895).

⁴⁰ Below, pp. 357-8.

their people against dangers in virtue of their police power,⁴¹ but this has been answered by the statement that such explosives are as much lawful articles of commerce as are intoxicating liquors.⁴²

All these discussions had reference to the Wilson act of 1890,⁴³ which provides that intoxicating liquors "transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." This act owes its immediate origin⁴⁴ to the "original package" decision in *Leisy v. Hardin*,⁴⁵ although such a decision had been anticipated by a similar bill in the preceding congress.⁴⁶ In this case Chief Justice Fuller, for the court, says: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled. * * * Being thus articles of commerce, can a State, in absence of legislation on the part of congress, prohibit their importation [importation of intoxicants] * * * or when imported prohibit their sale by the importer? * * * The conclusion follows that * * * the States cannot exercise that power [to regulate interstate commerce] without the assent of congress * * * but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon congress, so far as the regulation of commerce is concerned to remove the restriction upon the States in dealing with imported articles of trade within their limits, which have not been mingled with the common mass of prop-

⁴¹ 21 Cong. Rec. 5324-5 (1890).

⁴² *Ibid.*, 5327.

⁴³ Act of Aug. 8, 1890, ch. 728, 26 Stat. L. 313.

⁴⁴ Senate Rpt., 1889-90, No. 993; 21 Cong. Rec. 4642 (1890).

⁴⁵ 135 U. S., 100, 34 L. Ed. 128, 132 (1890).

⁴⁶ Senate Bill, No. 1067, 20 Cong. Rec., 1882, 1884 (1889).

erty therein. * * * Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere."⁴⁷ The Chief Justice had a precedent for the position taken as to the *permission* of congress in the opinion of the court delivered by Justice Mathews in *Bowan v. Railway Co.*,⁴⁸ apparently the earliest case in which there is any suggestion that the power to regulate interstate commerce, vested, according to the court's previous interpretation of the Constitution, exclusively in congress, may, through the action of congress, be exercised by the States.

When the provision was discussed in congress it was justified as giving the "permission" expressly allowed by the dictum of the court in *Leisy v. Hardin*,⁴⁹ as a grant of local option,⁵⁰ as a removal of an impediment to the exercise of the police powers of the States,⁵¹ as following the precedent of State taxation of shares of national banks.⁵² But the bill was opposed as delegating an exclusive power of congress to the States,⁵³ and as to the "permission" suggested it was said that "jurisdiction even in the courts is not a matter of consent, but a matter of law," that "when the Constitution has conferred a power upon congress the consent of congress and the States can not take from congress its jurisdiction, nor can the consent of congress and the States confer upon the States a jurisdiction which by the Constitution is conferred upon congress."⁵⁴ Senator Hoar's interpretation of the decision in *Leisy v. Hardin* is of special importance as it expresses principles later announced in *Rahrer's* case. The court, he said, has not declared that congress "may delegate power to the States. * * *

⁴⁷ See the similar reasoning in *Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 150, 153 (1890).

⁴⁸ 125 U. S., 465, 31 L. Ed. 700, 707 (1888).

⁴⁹ E. g., 21 Cong. Rec. 4642, 4954 (1890); Senate Rpt., 1889-90, No. 993.

⁵⁰ 21 Cong. Rec., 4904 (1890).

⁵¹ 20 Cong. Rec., 1885 (1889).

⁵² 20 Cong. Rec., 1886; 21 Cong. Rec., 4957 (1890).

⁵³ E. g., 21 Cong. Rec., 4642, 4956, 5324, 5332 (1890).

⁵⁴ *Ibid.*, 4964. Senator Eustis said: 'Call it permission, call it pretermission * * * call it a license, call it a grant, disguise it as you may by cunning phraseology, looking to the dictionary for some words which can cover the true purpose and effect of this bill, and, after all, it is nothing but bestowing upon the State * * * that which she has not now, in order to enable her to regulate commerce among the States in violation of the Constitution of the United States.' *Ibid.*, 5332.

What they have undertaken to say is this * * * that, recognizing the complete and exclusive control of congress over interstate and international commerce, congress may also by legislation declare that certain subjects shall not be for legislative purposes treated as subjects of interstate commerce."⁵⁵ He also found precedents for such legislation in the power of the States "by the permission of congress" to make their own quarantine laws, etc. As to this latter proposition Senator Hiscock maintained⁵⁶ that there is a wide difference between the subjects which are entirely within the jurisdiction of the States for certain purposes until congress takes that jurisdiction, and those over which the States have primarily no jurisdiction.⁵⁷

When the constitutionality of the act was contested in Rahrer's case,⁵⁸ Chief Justice Fuller, in delivering the opinion of the court, although he cites the decisions in *Bowan v. Railway Co.*, and *Leisy v. Hardin* as determining that commerce is free so long as congress has not passed any law "to regulate it specifically, or in such way as to allow the laws of the State to operate upon it," thereafter keeps clear of the "permission" and "consent" of those cases. After referring to the clause of the Constitution expressly authorizing the exercise of certain powers by the States with the consent of congress, he says: "Beyond this congress is not empowered to enable the State to go in this direction, nor can congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution. * * * It does not admit of argument that congress can neither delegate its own powers nor enlarge those of a State. * * * Congress has not attempted to delegate the power to regulate commerce, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation."⁵⁹ * * * The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of

⁵⁵ *Ibid.*, 4962-3.

⁵⁶ 21 Cong. Rec., 4962 (1890).

⁵⁷ See also *ibid.*, 5324-5.

⁵⁸ *In re Rahrer*, 140 U. S. 545, 35 L. Ed., 572, 576 (1891).

⁵⁹ The court suggests, but does not decide, that this act might be justified on the local option principle.

property in the country or State. * * * Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. * * * Jurisdiction attached, not in virtue of the law of congress, but the effect of the latter was to place the property where jurisdiction could attach."⁶⁰ Thus the idea of "permission" is repudiated. Congress does not act upon the *States* but upon *things*, so that what was interstate commerce prior to the legislation of congress has ceased in part to be such after that legislation. But the courts, the supreme court of the United States included, have been unable thoroughly to assimilate this doctrine, and persist in speaking of this act as *subjecting* interstate commerce to the power of the States,⁶¹ as the *permission*⁶² or *consent*⁶³ of congress or the *authority* from congress,⁶⁴ as *allowing* or *enabling* the States to act,⁶⁵ as *giving* power to the States,⁶⁶ as *conferring* power upon the States.⁶⁷ Later laws, modelled after the Wilson act and passed for similar purposes, but referring to the transportation of game⁶⁸ and oleomargarine⁶⁹ respectively, have developed no new doctrine, although the natural feeling that such legislation has actually added new power to the States is expressed more frankly than usual in the language of the Arkansas

⁶⁰ See also in re Rahrer, 43 Fed., 556 (1890); in re Van Vliet, 43 Fed. 761 (1890); in re Spickler, 43 Fed. 653, 657 (1890); North Dakota v. Fraser, 1 N. D. 425, 433 (1891); Indianapolis v. Bieler, 138 Ind. 30, 36 (1893); ex parte Edgerton, 59 Fed. 115, 118 (1893); ex parte Jervey, 66 Fed. 957, 960 (1895); Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 57 (1898).

⁶¹ Indianapolis v. Bieler, 138 Ind., 30, 36 (1893).

⁶² Ex parte Jervey, 66 Fed. 957, 960 (1895); Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49 (1898).

⁶³ In re Bergen, 115 Fed. 339, 342 (1900).

⁶⁴ People v. Hesterberg, 184 N. Y. 126, 132 (1906).

⁶⁵ Delameter v. South Dakota, 205 U. S., 93, 51 L. Ed. 724, 728 (1907).

⁶⁶ State v. Hanaphy, 90 N. W. (Ia) 601, 602 (1902).

⁶⁷ Pabst Brewing Co. v. Crenshaw, 198 U. S., 17, 49 L. Ed., 925, 929 (1905).

⁶⁸ Act of May 25, 1900, ch. 553, secs. 3, 5, 31 Stat. L. 187; House Rpt., 1899-1900, No. 474; 33 Cong. Rec. 4873; People v. Bootman, 180 N. Y., 1, 6 (1904).

⁶⁹ Act of May 9, 1902, ch. 784, sec. 1, 32 Stat. L. 193; 35 Cong. Rec. 1311, 1358, 1554, 3241; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 57 (1898); United States v. Green, 137 Fed., 179, 187 (1905).

court,⁷⁰ to the effect that by the latter act "congress conferred upon the States * * * a police power not theretofore possessed."⁷¹

The exclusive power of congress to legislate concerning the disposal of the public lands has been affected, or interpreted, in a similar manner. An act of 1866 opens mineral lands to purchase "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States,"⁷² and directs that as a condition of sale, "in the absence of necessary legislation by congress, the local legislature of any State or Territory may provide rules for working mines * * * and these conditions shall be expressed in the patent."⁷³ Further, an act of 1872⁷⁴ provides that "the miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location," etc., of mining claims.⁷⁵ Congress at the time apparently regarded these acts as "adopting" the local regulations then in existence and thereafter to be enacted, without raising any question of delegation of power.⁷⁶ And in the numerous cases in which these acts have been considered by the courts it seems that there is only one in which that objection has been suggested, although often the local regulations involved have been made subsequent to the acts of congress. The courts have regarded these acts as having "recognized these rules and customs aslaw,"⁷⁷ as a "surrender"

⁷⁰ Wells Fargo Express Co. v. State, 96 S. W. (Ark.) 189, 190 (1906.)

⁷¹ See also Act of Aug. 1, 1888, ch. 729, 25 Stat. L. 357; Blair v. Ostrander, 109 Ia., 204, 208 (1899).

⁷² Act of July 26, 1866, ch. 262, sec. 1, 14 Stat. L. 251; Act of May 10, 1872, ch. 152, sec. 1, 17 Stat. L. 91; Rev. Stats., sec. 2319. For the status of these local regulations prior to the act of 1866 see especially Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 791 (1879).

⁷³ Act of July 26, 1866, ch. 262, sec. 5, 14 Stat. L. 251, Rev. Stats., sec. 2338.

⁷⁴ Act of May 10, 1872, ch. 152, sec. 5, 17 Stat. L. 91, Rev. Stats., sec. 2324.

⁷⁵ See also Act of July 9, 1870, ch. 235, sec. 13, 16 Stat. L. 217, Rev. Stats., sec. 2332; Act of May 10, 1872, ch. 152, sec. 3, 17 Stat. L. 91, Rev. Stats., sec. 2322; Act of Mar. 1, 1893, ch. 183, 27 Stat. L. 507.

⁷⁶ Cong. Globe, 1865-6, pp. 3234, 3452; Cong. Globe, 1871-2, p. 2460.

⁷⁷ King v. Edwards, 1 Mont. 235, 239 (1870); McCormick v. Varnes, 2 Utah 355, 357 (1879).

of a right to the States,⁷⁸ as recognizing "the rights of the States to pass acts supplementing the mining act of congress."⁷⁹ In *People v. District Court*⁸⁰ it is said that "in so far as the provisions of the act may be regarded as conferring power upon the State legislature to regulate the manner of using and operating mining claims * * * it would seem * * * that the States already possessed this power. Being comparatively a new question, however, at the date of the passage of the congressional act, this and the other permissive clauses were properly and wisely inserted." In *Mares v. Dillon*,⁸¹ the only case noticed in which the validity of the State regulations has been attacked on the ground of delegation of power, counsel emphasized the distinction between Territories and States in this particular, and between adopting existing regulations and those to be enacted in the future; but the court failed to consider the objection offered, and upheld the validity of the State regulations on precedents which have no bearing on the question of delegation of power. In *Shoshone Mining Co. v. Rutter*⁸² the question involved pertained to jurisdiction and not constitutionality, but the decision in that case may be regarded as settling the law, putting as it does these acts of congress on the same footing with those regarding the regulation of interstate commerce above considered. The court says: "The recognition by congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of federal law;" and quotes from *Rahrer's case*:⁸³ "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws."⁸⁴ A similar construction had already been given by the same court to the act of 1886⁸⁵ providing that no railway-grant lands "shall be exempt from taxation by States, Territories, and municipal

⁷⁸ *Woodruff v. Gravel Min. Co.*, 18 Fed. 753, 774 (1884).

⁷⁹ *Mining Co., v. Allman*, 23 Utah 410, 417 (1901).

⁸⁰ 11 Colo. 147, 154 (1887).

⁸¹ 30 Mont. 117, 120 (1904).

⁸² 177 U. S., 505, 44 L. Ed. 864, 865 (1900).

⁸³ Above, pp. 357-8.

⁸⁴ See also *Trafton v. Noughes*, Fed. Cas., No. 14, 134 (1877); *Miller's Executors v. Swann*, 150 U. S. 132, 37 L. Ed. 1028, 1029 (1893).

⁸⁵ Act of July 10, 1886, ch. 764, sec. 1, 24 Stat. L. 143.

corporations on account of the lien of the United States upon the same * * * or because no patent has been issued therefor." In commenting on this law in *Central Pacific R. R. Co. v. Nevada*,⁸⁶ the court says that "express authority was given to tax the lands," and then that the effect of this act was merely to remove the only obstacle to the enforcement of the State laws enacted prior to the act of congress.⁸⁷

From the above confusing array of decisions and discussions in reference to such legislation it is apparent that the admission of unconstitutional delegation of legislative power has been avoided by several distinct lines of reasoning, alone or in combination.

1. The doctrine of *National Bank v. Commonwealth*, which radically modifies precedent long settled and practically divides anew the field of legislation between the United States and the States by a movable boundary line; and the doctrine distinctive of *Rahrer's case*, which shifts the effect of acts of congress from a delegation of power to the States to an operation on *things*, and thus, it would seem, opens indefinite possibilities to decentralization of legislative authority, are both, however well established they may be, unsatisfactory in theory and capable of abuse in practice.

2. The position, for which there is little authority indeed, that the State laws passed under such acts owe none of their validity to them, but are authorized solely by the inherent power of the States, has no foundation and cannot be maintained.

3. The most plausible justification of such legislation announced is that of the inherent power of the States to act upon the removal of restrictions by congress. But here there seems to be a confusion of this class of laws with the first class above discussed, and in fact the identity of the two classes has been asserted. Although the States are prevented from exercising certain powers which they have heretofore

⁸⁶ 162 U. S. 512, 40 L. Ed. 1057, 1060 (1896).

⁸⁷ Other acts of congress in regard to the public lands involving the same principles are: Act of May 23, 1844, ch. 17, 5 Stat. L. 657; Act of June 21, 1866, ch. 127, sec. 2, 14 Stat. L. 66, Rev. Stats., sec. 2292; Act of Mar. 2, 1867, ch. 177, 14 Stat. L. 541, Rev. Stats., sec. 2387. In decisions of the courts construing such acts, no considerations of delegation of power have been noticed, but their constitutionality appears not to have been questioned.

enjoyed, after congress has enacted legislation inconsistent therewith, and which, upon the repeal of that federal legislation, they again enjoy, it does not follow that a withdrawal of congress from a field not originally open to State legislation will leave the States free to act therein. The power of the States is subject to restrictions imposed by the Constitution, and it would seem that congress may not remove restrictions which congress has not imposed.

4. The most natural view of such acts as permission, grant, gift, etc., persistently recurring in court decisions, although sometimes there repudiated, can lead to nothing but confusion, for these expressions are mere substitutes for the impossible *delegation*. But the naturalness and persistence of this idea is itself proof of the extremely unsatisfactory character of the other solutions which have been offered—solutions of the problem how to prevent delegation of legislative power in fact from becoming delegation of legislative power in law.

III

Statutes of the class remaining to be considered effect an adoption of State laws as laws of the United States. They include laws governing federal courts, laws governing certain federal executive officers, and criminal laws. Statutes adopting "enacted" legislation of the States and thus involving no delegation of legislative power, are to be distinguished from such as adopt "potential" legislation of the States and thereby delegate legislative authority to the States.

1. By the terms of the judiciary act⁸⁸ "the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." The prospective character of this provision was early recognized by the courts, the court saying in *Golden v. Prince*,⁸⁹ that "the words of this section are general, so as to include, as well the laws of the respective States, which might there-

⁸⁸ Act of Sept. 24, 1789, ch. 20, sec. 34, 1 Stat. L. 73, Rev. Stats., sec. 721.

⁸⁹ Fed. Cas. No. 5, 509, p. 543 (1814).

after be passed, as those which were then in existence."⁹⁰ But the provision is satisfactorily explained as "the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made."⁹¹ "The truth is that * * * [this] is a declaratory act, announcing a general doctrine of international law, and the supreme court have so construed it."⁹² Indeed it is held that "so far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that congress had the power to establish."⁹³ Moreover, it considered that the courts of the United States in enforcing these State laws "are not foreign courts," but that the Constitution "has made them courts within the States to administer the laws of the States in certain cases."⁹⁴

But the act contemplates legislation by congress directing a departure from the State laws as rules of decision, and the courts have held that they are bound by only such laws as have become rules of property and no further.⁹⁵ The State laws, then, which may be disregarded are not within the principle of universality and necessity, and hence it would seem that the prospective adoption of those laws could not be consistently justified against the objection of delegation of legislative power. At an early day it was decided⁹⁶ that the State laws of evidence in civil suits at common law are included in those laws which are adopted as rules of decision. So when congress enacted in 1862⁹⁷ that "the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts

⁹⁰ See also *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, 264 (1825).

⁹¹ *Wayman v. Southard*, 10 Wheat. 1; 6 L. Ed. 253, 264 (1825).

⁹² *Hayden v. Oriental Mills*, 15 Fed. 605, 606 (1883). See also *Golden v. Prince*, Fed. Cas., No. 5, 509, p. 543 (1814); *ex parte Biddle*, Fed. Cas., No. 1, 391 (1822); *Bank v. Dudley's Lessee*, 2 Pet. 492, 7 L. Ed. 496, 525 (1829); *Hawkins v. Barney's Lessee*, 5 Pet. 457, 8 L. Ed. 190, 193 (1831).

⁹³ *United States v. Reid*, 12 How. 361, 13 L. Ed., 1023 (1851).

⁹⁴ *Tennessee v. Davis*, 100 U. S., 257, 25 L. Ed. 648, 653 (1880).

⁹⁵ *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed., 865 (1842). See also *Boyce v. Tabb*, 18 Wall. 546, 21 L. Ed. 757 (1873); *Sandford v. Portsmouth*, Fed. Cas., No. 12,315, p. 364 (1877).

⁹⁶ *M'Niel v. Holbrook*, 12 Pet. 84, 9 L. Ed. 1009, 1011 (1838); *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111 (1880).

⁹⁷ Act of July 16, 1862, ch. 189, sec. 1, 12 Stat. L. 588, Rev. Stats., sec. 858.

of the United States, in trials at common law, in equity, and admiralty," it simply extended the principle to equity and admiralty cases.⁹⁸ And this act has always been assumed to be prospective in operation.⁹⁹ It would seem, then, that either the principle of "universal law" applies also, to a certain extent at least, to suits in equity and admiralty, in which case it was very late indeed in receiving proper recognition, or that the prospective operation of the law in regard to such trials constitutes a delegation of power.

In *Wayman v. Southard*¹⁰⁰ Chief Justice Marshall held that the provision for "rules of decision" cannot apply to State procedure, as that provision is prospective in character. "The State assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the Constitution vests in congress, and cannot receive it by delegation. * * * If, then, it [this provision] embraces the rules of practice, the modes of proceedings in suits; if it adopts future State laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the State legislatures the power which the Constitution has conferred on congress." But there has been very much inconsistency indeed in applying this principle in various acts governing the procedure of United States courts.

The first of the "process acts"¹⁰¹ was passed in the same year as the provision which has just been discussed. This temporary law directs that "the forms of writs and executions, except their style, and modes of process * * * in the circuit and district courts, in suits at common law, shall be the same in each State respectively as now are used or allowed in the supreme courts of the same." In 1792 this provision was practically reenacted,¹⁰² but reference was still made to the State laws of 1789, and these were made subject to alteration by the United

⁹⁸ Cong. Globe, 1861-2, p. 3261; *Robinson v. Mundell*, Fed. Cas., No. 11, 959, pp. 1027, 1029, (1868); *United States v. Brown*, Fed. Cas., No. 14, 671, p. 1275 (1871).

⁹⁹ E. g., *United States v. Brown*, Fed. Cas. No. 14, 671, p. 1275 (1871); *Packet v. Clough*, 20 Wall. 528, 22 L. Ed. 406, 407 (1874).

¹⁰⁰ 10 Wheat. 1, 6 L. Ed. 253, 264 (1825).

¹⁰¹ Act of Sept. 29, 1789, ch. 21, 1 Stat. L. 93. Continued to 1792. Act of May 26, 1790, ch. 13, 1 Stat. L. 123; Act of Feb. 18, 1791, ch. 8, 1 Stat. L. 191; Act of May 8, 1792, ch. 36, sec. 8, 1 Stat. L. 275.

¹⁰² Act of May 8, 1792, ch. 36, sec. 2, 1 Stat. L. 275.

States courts. These acts were clearly not prospective in operation, and of course no changes in the State laws were binding on the federal courts,¹⁰³ but it was apparently assumed in *Bank of United States v. Halstead*¹⁰⁴ that congress might have allowed such prospective operation. Since the act was not applicable to States which had later entered the Union,¹⁰⁵ a similar statute was enacted in 1828¹⁰⁶ for those States.¹⁰⁷ But as this act, too, was not prospective in character,¹⁰⁸ although in *Oelrich v. Pittsburg*¹⁰⁹ it is again intimated that congress might well have made it so, the same difficulty arose again and was similarly met by the act of 1842.¹¹⁰ This act makes the provisions of the act of 1828 applicable to States admitted since the passage of the act of 1842.

A new provision, first introduced in the special legislation for Louisiana,¹¹¹ was embodied in the act of 1828,¹¹² permitting the courts for the several States by rules "so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the State courts."¹¹³ Further, in 1872¹¹⁴ other procedure heretofore required by the process acts to conform to the State regulations in force at the time of the passage of those acts

¹⁰³ Cf. *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, 260 (1825); *Ross v. Duval*, 13 Pet. 45, 10 L. Ed., 51, 57 (1839).

¹⁰⁴ 10 Wheat 51, 6 L. Ed. 264, 266 (1825).

¹⁰⁵ *Fullerton v. Bank of United States*, 1 Pet., 604, 7 L. Ed., 280, 284 (1828). See also argument of counsel in *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed., 253, 256 (1825).

¹⁰⁶ Act of May 19, 1828, ch. 68, sec. 1, 4 Stat. L. 278.

¹⁰⁷ *Beers v. Haughton*, 9 Pet. 329, 357 (1835); *Ross v. Duval*, 13 Pet. 45, 10 L. Ed. 51 (1839).

¹⁰⁸ Cf. *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145, 158 (1835); *Shrew v. Jones*, Fed. Cas. No. 12, 818, p. 41 (1840); *Catherwood v. Gapete*, Fed. Cas. No. 2, 513 (1854).

¹⁰⁹ Fed. Cas. No. 10, 444, p. 600 (1859). In congress an attempt was made to strike out the word "now," in order to include State laws to be passed in the future. 4 Cong. Debates 583. See Rowan's distinction between the adoption of the "potential legislation" of the States and the adoption of their "exerted will." *Ibid.*, 358, 360.

¹¹⁰ Act of Aug. 1, 1842, ch. 109, 5 Stat. L. 499.

¹¹¹ Act of May 26, 1824, ch. 181, sec. 1, 4 Stat. L. 62.

¹¹² Sec. 3.

¹¹³ The same principle is contained in the law at present. Act of June 1, 1872, ch. 255, sec. 6, 17 Stat. L. 196, Rev. Stats., sec. 916.

¹¹⁴ Act of June 1, 1872, ch. 255, sec. 5, 17 Stat. L. 196, Rev. Stats., sec. 914.

but subject to alteration by the United States courts, was made "to conform as near as may be" to the procedure "existing at the time in like causes" in the State courts, "any rule of the court to the contrary notwithstanding." Such discretionary power as is allowed in these provisions has not prevented the courts from recognizing the obligatory force of changes in the State procedure. It is admitted in *Fink v. O'Neil*¹¹⁵ that the act of 1828 restricted the former discretionary power of the courts, preventing them thereafter from departing from the State procedure of the time unless to adopt changes made by the States. And it is also acknowledged that procedure regulated by the act of 1872 "must * * * follow subsequent changes in the procedure in like causes in the State courts."¹¹⁶ "While the act * * * is to a large extent mandatory, it is also to some extent only directory and advisory."¹¹⁷ The federal courts had not used their power, as much as they might, to modify the antiquated State regulations and thus establish a uniformity between the federal and the contemporary State practice, and it was the purpose of the act of 1872 to bring about such a uniformity.¹¹⁸ Since, then, these State provisions have an obligatory force, whatever its extent, upon the courts of the United States, it would seem that congress has in effect prospectively adopted State laws for the guidance of those courts. In such legislation there is apparently an attempt to find a legal middle ground between leaving everything to the discretion of the courts on the one hand, and an unconstitutional delegation of legislative power to the States on the other.¹¹⁹ The validity of this legislation and other legislation of a similar character¹²⁰ has been assumed without question by the

¹¹⁵ 106 U. S. 272, 27 L. Ed., 196, 198 (1882).

¹¹⁶ *Lamaster v. Keeler*, 123 U. S., 376, 31 L. Ed., 238, 241 (1887).

¹¹⁷ *Indianapolis & St. L. R. R. Co., v. Horst*, 93 U. S., 291, 23 L. Ed., 898, 901 (1876). See also *Sandford v. Portsmouth*, Fed. Cas., No. 12, 315, p. 365 (1877); *ex parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117, 1120 (1885).

¹¹⁸ *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286, 290 (1875).

¹¹⁹ Cf. Cong. Globe, 1872-3, p. 2493.

¹²⁰ Act of Mar. 14, 1848, ch. 18, 9 Stat. L. 213 (Cf. Cong. Globe, 1847-8, p. 196), Rev. Stats., sec. 933; Act of June, 1872, ch. 255, sec., 6, 17 Stat. L. 196, Rev. Stats., sec. 915; Act of Aug. 1, 1888, ch. 728, 25 Stat. L. 357; Act of Mar. 1, 1889, ch. 333, sec. 6, 25 Stat. L. 783; Act of Aug. 18, 1890, ch. 797, sec. 1, 26 Stat. L. 316.

courts.¹²¹ Even an act of 1892¹²² making it "lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held," has been assumed to be valid though regarded as prospective in operation.¹²³

A law of 1839,¹²⁴ directs that "no person shall be imprisoned for debt in any State, on process issuing out of a court of the United States, where by the laws of such State, imprisonment for debt has been abolished; and where by the laws of a State, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein, as are adopted in the courts of such State." Because at least the first clause of this act had been declared¹²⁵ to be not prospective in operation, and hence not applicable to State laws passed after its enactment, the act was in 1841¹²⁶ construed by congress "to abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever, where, by virtue of the laws of the State in which such court shall be held, imprisonment for debt has been, or shall hereafter be, abolished."¹²⁷ Since this act was silent on the clause of the act of 1839 providing for modifications of imprisonment for debt, it was held that the latter was not made prospective by the act of 1841, the court at the same time expressing doubts as to the power of congress to "adopt prospectively, future legislation of the several States abolish-

¹²¹ E. g., *Gaines v. Travis*, Fed. Cas., No. 5, 180, p. 1064 (1849); *Low v. Durfee*, 5 Fed. 256, 259 (1880); in re *Secretary of Treasury of United States*, 45 Fed. 396 (1891).

¹²² Act of Mar. 9, 1892, ch. 14, 27 Stat. L. 7.

¹²³ *Mulcahey v. Lake Erie and W. R. Co.*, 69 Fed. 172 (1895).

¹²⁴ Act of Feb. 28, 1839, ch. 35, 5 Stat. L. 321.

¹²⁵ "By at least one of the courts" (opinion not found in reports). "A letter from a judge of the supreme court * * * stated that to be the proper construction, according to the uniform decisions of that high tribunal in similar cases." 8 Cong. Globe 251 (1840); 9 Cong. 41 (1841). See also in re *Freeman*, Fed. Cas. No. 5,083, p. 752 (1855). *United States v. Walsh*, Fed. Cas. No. 16, 635, p. 393 (1867).

¹²⁶ Act of Jan. 14, 1841, ch. 2, 5 Stat. L. 410.

¹²⁷ Mr. Adams, in the house, urged "some constitutional objections" to the bill in this form, and offered an amendment to strike out "or shall be hereafter." But the result of the debate which followed, "involving split-hair distinctions in matters of law," was the rejection of the amendment. 9 Cong. Globe 96 (1841). A similar bill had passed the house at the last session, 8 Cong. Globe 251 (1840).

ing imprisonment for debt."¹²⁸ On this account, the State laws on the subject having undergone changes since 1839, and the laws of 1839 and 1841 not applying at all to States since admitted,¹²⁹ an act of 1867¹³⁰ provides that all modifications, etc., of imprisonment for debt, "now existing"¹³¹ by the laws of any State, shall be applicable to process issuing out of the courts of the United States therein, and the same course of proceedings shall be adopted as now are or may be in the courts of such States." The act thus adopts the modifications, etc., "then existing by the laws of the several States, and the course of proceedings which shall thereafter be adopted therein."¹³² The Revised Statutes¹³³ have substituted "provided" for "now existing," and "may be," for "now are or may be." The whole provision is thus now apparently prospective in application. Such legislation is regarded as valid in *Gaines v. Travis*¹³⁴ where it is said that "there is no doubt that congress may, by clear enactment, adopt prospective legislation of the States, and impart to it the effect of an act of the national government," and hence that in case of a repeal of the State code of practice, the latter would "*eo instanti* cease to have influence over the proceedings of the United States courts."

By each of the acts of congress on the subject¹³⁵ it is provided that persons imprisoned on process issuing from United States courts in civil actions shall be entitled to the same privileges of jail yards as persons so imprisoned under State authority "are"¹³⁶ entitled to, and under the like regulations and restrictions." The validity of the pro-

¹²⁸ *In re Freeman*, Fed. Cas., No. 5, 083, p. 751 (1855). See also *United States v. Walsh*, Fed. Cas., No. 16, 635, p. 393 (1867).

¹²⁹ *Hanson v. Fowle*, Fed. Cas., No. 6, 041, p. 466, (1871).

¹³⁰ Act of Mar. 2, 1867, ch. 180, 14 Stat. L. 543.

¹³¹ The original bill here inserted "or which may hereafter be adopted," but these words were struck out upon the recommendation of the senate committee on judiciary. Cong. Globe, 1866-7, p. 1579.

¹³² *United States v. Tetlow*, Fed. Cas., No., 16, 456, p. 44 (1872).

¹³³ Sec. 990. See also first part of the act of 1867, embodied in Rev. Stats., sec. 991.

¹³⁴ Fed. Cas., No. 5, 180, p. 1064, (1849).

¹³⁵ Act of May 5, 1792, ch. 29, sec. 1, 1 Stat. L. 265; Act of May 30, 1794, ch. 34, 1 Stat. L. 370; Act of May 28, 1796, ch. 38, sec. 1, 1 Stat. L. 482; Act of Jan. 6, 1800, ch. 4, sec. 1, 2 Stat. L. 4; Rev. Stats., sec. 992.

¹³⁶ The "now" of the early process acts is here omitted. Cf. counsel in *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465, 468 (1840).

vision was assumed in *United States v. Noah*,¹³⁷ although apparently¹³⁸ it was regarded as prospective in operation. But Justice Story in *United States v. Knight*¹³⁹ construed it as not prospective, saying: "I entertain very serious doubts, whether congress does possess a constitutional authority to adopt prospectively State legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power. * * * At all events, I should not be disposed to give such a construction to any act of congress, unless it was positively required by its words and its intent; which, it seems to me, cannot be affirmed of the act of 1800." The supreme court also held¹⁴⁰ that the act was not prospective, but did not consider the question of delegation of power in the opinion as reported.¹⁴¹

The bankruptcy act of 1867,¹⁴² after enumerating certain classes of property as exempted from process, adds "such other property * * * as is exempted * * * by the laws of the State * * * in force in the year eighteen hundred and sixty-four;" but on account of changes in State laws¹⁴³ this date was later made 1871.¹⁴⁴ In the present bankruptcy law¹⁴⁵ there is a change of principle, and it is provided, as had been suggested in the discussion of the bill of 1867,¹⁴⁶ that the act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of filing the petition." Further, not only the acts mentioned but the previous acts on the subject,¹⁴⁷ recognize State laws in regard to priority, liens, etc., future State laws being doubtless included.¹⁴⁸ There is very little

¹³⁷ Fed. Cas., No. 15,894, p. 177 (1825).

¹³⁸ Cf. counsel in *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465, 468 (1840).

¹³⁹ Fed. Cas., No. 15,539, p. 797 (1838).

¹⁴⁰ *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465, 472 (1840).

¹⁴¹ See argument of counsel in the case to show the prospective character of the act and the power of congress to pass such an act.

¹⁴² Act of Mar. 2, 1867, ch. 176, sec. 14, 14 Stat. L. 517.

¹⁴³ Cong. Globe, 1871-2, p. 4182.

¹⁴⁴ Act of June 8, 1872, ch. 339, 17 Stat. L. 334.

¹⁴⁵ Act of July 1, 1898, ch. 541, sec. 6, 30 Stat. L. 544.

¹⁴⁶ A proposed amendment to the bill substituted "at the time when such proceedings shall have been commenced" for "in the year 1864." Cong. Globe, 1866-7, p. 955.

¹⁴⁷ Act of Apr. 4, 1800, ch. 19, 2 Stat. L. 19; Act of Aug. 19, 1841, ch. 9, 5 Stat. L. 440.

¹⁴⁸ Cf. in re *Stuyvesant Bank*, Fed. Cas., No. 12,919 (1874).

precedent considering the validity of such provisions from the point of view of delegation of legislative power. In the important case of *Hanover Bank v. Moyses*¹⁴⁹ Chief Justice Fuller does not state the grounds upon which the opinion of the court was based: "Nor can we perceive in the recognition of the local law in the matter of exemption, dower, priority of payments and the like, any attempt by congress to unlawfully delegate its legislative power." But he cites *Rahrer's case*,¹⁵⁰ and it is thus possible that he justifies such legislation partly by the concurrent power of the States to pass insolvency laws and thus places such legislation in the class discussed in the preceding section. If so he departs very widely indeed from the heretofore accepted view that the provisions of the bankruptcy acts in reference to exemptions simply continue the policy as to exemptions in general followed by the federal courts in the execution of judgments under the process acts.¹⁵¹ If the latter view is correct, the same considerations will apply to the exemption provisions as to those process acts.

The criminal procedure also of the federal courts has been affected to some extent by similar legislation. Chief Justice Taney,¹⁵² in refusing to include the State law of evidence in criminal cases in the "rules of decision" for the federal courts, said: "But it could not be supposed, without very plain words to show it, that congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design

¹⁴⁹ 186 U. S. 181, L. Ed. 1113, 1120 (1902).

¹⁵⁰ Above, pp. 357-8.

¹⁵¹ In *re Hopkins*, Fed. Cas., No. 6,683, p. 490 (1856); in *re Ruth*, Fed. Cas., No. 12,172, p. 95 (1867); in *re Wyllie*, Fed. Cas., No. 18,112, p. 735 (1872); in *re Smith*, Fed. Cas., No. 12,996, p. 413 (1876); *Richardson v. Woodward*, 104 Fed. 873, 874 (1900); *Steele v. Buel*, 104 Fed. 968, 972 (1900). Cf. Act of June 1, 1872, ch. 255, sec. 14, 17 Stat. L. 198, Rev. Stats., secs. 1042, 5296. The force of State laws in the civil procedure of the federal courts is further seen in Act of July 4, 1840, 5 Stat. L., 393, Rev. Stats., sec. 962; Act of Aug. 23, 1842, ch. 188, sec. 8, 5 Stat. L. 516, Rev. Stats., sec. 966; *Perkins v. Fourquinet*, 14 How. 328, 14 L. Ed. 441, 443 (1852); *Railroad Co. v. Tobriner*, 147 U. S. 571, 37 L. Ed., 284, 290 (1893). See also above, p. 359, note 71.

¹⁵² *United States v. Reid*, 12 How. 361, 13 L. Ed. 1023, 1024 (1851).

of this act of congress." But the judiciary act¹⁵³ had long before provided for the arrest, imprisonment, and bail of offenders against the laws of the United States by certain judicial officers "agreeably to the usual mode of process against offenders in such State." And this section has been applied in many decisions, in which its prospective nature is expressly asserted or distinctly assumed by the courts, without its constitutionality being questioned.¹⁵⁴ Moreover an act of 1798¹⁵⁵ gives such officers "the like power and authority to hold to security of the peace, and for good behaviour * * * as may or can be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them." And the latter act seems to be regarded in the same way as the former. Finally, a law of 1872¹⁵⁶ provides that in "all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty * * * the said judgment * * * may be enforced against the property of the defendant in like manner as judgments in civil cases are enforced." For a criticism of this provision, then, reference is made to the discussion of the provisions regarding final process in civil actions.¹⁵⁷

Similar principles and similar difficulties appear in legislation in regard to jurors in federal courts. The judiciary act¹⁵⁸ directs that jurors in the United States courts shall be designated in each State respectively "according to the mode of forming juries therein now practiced," so far as practicable, and that they "shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law in such State." Since at least the provision for the designation of jurors was not prospective in application, and since changes had later been made in the mode of selecting jurors in the different States, and new States had been

¹⁵³ Act of Sept. 24, 1789, ch. 20, sec. 33, 1 Stat. L. 73, Rev. Stats., sec. 1014.

¹⁵⁴ E. g., *United States v. Rundlett*, Fed. Cas., No. 16,208 (1854); in re *Dana*, 68 Fed. 886,893 (1895); *United States v. Zarafonitis*, 150 Fed. 97,100 (1907).

¹⁵⁵ Act of July 16, 1798, ch. 83, 1 Stat. L. 609, Rev. Stats., sec. 727.

¹⁵⁶ Act of June 1, 1872, ch. 255, 17 Stat. L. 198, Rev. Stats., sec. 1041.

¹⁵⁷ Above, pp. 364-70. See the recommendation of the commission to revise the federal criminal law to extend the principle of conformity in civil actions to criminal actions. Senate Rpt., 1901-2, No. 68, Pt. 1, p. 287.

¹⁵⁸ Act of Sept. 24, 1789, ch. 20, sec. 29, 1 Stat. L. 73.

admitted in the meantime,¹⁵⁹ this provision was practically reenacted by the law of 1800,¹⁶⁰ so far as concerns the designation of jurors. For a similar reason¹⁶¹ the act of 1840¹⁶² was necessary. But this act makes the provision for qualifications as clearly not prospective as it does that for designation prospective,¹⁶³ providing that federal jurors "shall have the same qualifications, and be entitled to the same exemptions, as jurors of the highest courts of law of such State now have and are entitled to, and shall be designated * * * according to the mode of forming such juries now practiced and hereafter to be practiced therein," so far as practicable; and the courts of the United States "shall have power to make all necessary rules and regulations for conforming the designation and empanelling of jurors, in substance to the laws and usages now in force in such States; and further, shall have power, by rule or order, from time to time, to conform the same to any change which may hereafter be adopted by the legislatures of the respective States for the State courts." In the Revised Statutes¹⁶⁴ the clause relating to qualifications and exemptions is also made clearly prospective, the jurors of the federal courts having the same qualifications (with certain restrictions) and being entitled to the same exemptions as jurors of the highest State court of law "may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned." Although the courts thus have a discretionary power in regard to the mode of designating and empanelling, which they do not have in regard to qualifications and exemptions,¹⁶⁵ the real force of State legislation is apparent, whether we say that congress "adopts" the State laws with respect

¹⁵⁹ United States v. Price, Fed. Cas., No. 16,088 (1810).

¹⁶⁰ Act of May 13, 1800, ch. 61, 2 Stat. L. 82.

¹⁶¹ United States v. Woodruff, Fed. Cas., No. 16,758 (1846); United States v. Stowell, Fed. Cas., No. 16,409, p. 1354 (1854); United States v. Richardson, 28 Fed. 61, 68 (1886).

¹⁶² Act of July 20, 1840, ch. 47, 5 Stat. L. 394.

¹⁶³ Cf. United States v. Douglas, Fed. Cas., No. 14,989 (1851); United States v. Richardson, 28 Fed. 61, 68 (1886).

¹⁶⁴ Sec. 800. See also the special legislation for Pennsylvania: Act of Mar. 19, 1842, ch. 7, 5 Stat. L. 471; Act of Mar. 3, 1849, ch. 118, 9 Stat. L. 403; Act of June 30, 1879, ch. 52, sec. 2, 21 Stat. L., 43.

¹⁶⁵ Cf. United States v. Wilson, Fed. Cas., No. 16,737 (1855).

to the former,¹⁶⁶ or use the language of the court in *United States v. Collins*,¹⁶⁷ to the effect that congress "does not adopt the respective State laws, but only requires conformity to them in certain respects, and then gives the courts power to make rules for the attainment of such conformity in substance as far as practicable."¹⁶⁸ The same objections will apply here as apply to the process acts described above,¹⁶⁹ which are based upon exactly the same principle, but the validity of this legislation has been assumed, apparently without question.¹⁷⁰

In these various acts relating to the procedure and the jurors of the courts of the United States, congress has thus in some instances very carefully avoided any recognition of State laws to be enacted in the future, sometimes at least, to avoid an unconstitutional delegation of legislative authority, but in others has clearly adopted such laws, either directly or by thrusting the federal courts as a *tertium quid* between congress and the States. And the courts are no less inconsistent, sometimes declaring an act to be not prospective in operation in order to avoid a delegation of legislative power, but more often considering an act of exactly the same form to be prospective, and expressly declaring or clearly assuming such legislation to be valid, usually without an attempt to explain such validity.

2. The force of State legislation is further seen in acts of congress in reference to certain executive officers of the United States. The case of the marshals is the most important. "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." This provision of the Revised Statutes¹⁷¹ is practically the same as that of the original

¹⁶⁶ *United States v. Woodruff*, Fed. Cas., No. 16,758 (1846).

¹⁶⁷ Fed. Cas., No. 14,837, p. 546 (1873).

¹⁶⁸ See also *Alston v. Manning*, Fed. Cas., No. 266, p. 576 (1869); *Pointer v. United States*, 151 U. S. 396, 38 L. Ed. 208, 213 (1894); 9 Cong. Rec. 2007-8 (1879).

¹⁶⁹ Pp. 365-70.

¹⁷⁰ E. g., *United States v. Reed*, Fed. Cas., No. 16,134 (1852); *United States v. Stowell*, Fed. Cas., No. 16,409 (1854); *United States v. Richardson*, 28 Fed. 61, 68 (1886). See also Act of Apr. 29, 1802, ch. 31, 2 Stat. L. 167, Rev. Stats., sec. 805.

¹⁷¹ Sec. 788.

act of 1795,¹⁷² and of the act of 1861,¹⁷³ with the exception that "may have" is substituted for "have." But the prospective character of the section, in either form, has generally been assumed by the courts, and even for States admitted into the Union since the enactment of the provision, without any suggestion of the invalidity of such legislation,¹⁷⁴ and when the provision has not been construed to be "perambulatory," it has been assumed that congress could have made it so.¹⁷⁵ The marshal's fees, too, have been determined, in whole or in part, by such rates "as are now used or allowed,"¹⁷⁶ "as are allowed,"¹⁷⁷ and finally "as are or shall be allowed,"¹⁷⁸ for similar services by the States. Although the prospective operation of the law at the second stage seems to have been doubted in *The Trial*,¹⁷⁹ both its prospective operation and its validity were apparently generally assumed without question,¹⁸⁰ and there seems to have been no intimation of the invalidity of the present law, even in States admitted since its enactment.¹⁸¹

An act of 1796¹⁸² authorized the president to direct certain officers of the United States "to aid in the execution of quarantine,

¹⁷² Act of Feb. 28, 1795, ch. 36, 1 Stat. L. 424.

¹⁷³ Act of July 29, 1861, ch. 25, 12 Stat. L. 282.

¹⁷⁴ *Ex parte Ringgold*, Fed. Cas., No. 11,841 (1827); *Hyman v. Chales*, 12 Fed. 855 (1882); in *re Acker*, 66 Fed. 290, 294, 296 (1894); *John Bad Elk v. United States*, 177 U. S. 529, 44 L. Ed. 874, 876 (1900). Clearly expressed in *State v. Williams*, 72 Miss. 992, 993 (1895).

¹⁷⁵ *The E. W. Gorgas*, Fed. Cas., No. 4, 585 (1879).

¹⁷⁶ Act of Sept. 29, 1789, ch. 21, sec. 2, 1 Stat. L. 93.

¹⁷⁷ Act of May 8, 1792, ch. 36, sec. 3, 1 Stat. L. 275; Act of Feb. 28, 1799, ch. 19, sec. 1, 1 Stat. L. 624.

¹⁷⁸ Act of Feb. 26, 1853, ch. 80, sec. 1, 10 Stat. L. 161, 164, Rev. Stats., sec. 829.

¹⁷⁹ Fed. Cas., No. 14, 170, p. 190 (1830).

¹⁸⁰ *Townsend v. United States*, Fed. Cas., No. 14,119, p. 106 (1822). *Pomroy v. Harter*, Fed. Cas., No. 11,263 (1839).

¹⁸¹ *E. g.*, *Amato v. Jacobus*, 58 Fed. 855 (1893); *Dexter v. Sayward*, 78 Fed. 275, 276 (1897). So, until 1883, it is provided that the clerk of the supreme court shall receive, in part, "double the fees of the clerk of the supreme court of the State in which the supreme court shall be holden." Act of May 8, 1792, ch. 36, sec. 3, 1 Stat. L. 275; Act of Feb. 28, 1799, ch. 19, sec. 9, 1 Stat. L. 624; Act of Mar. 3, 1883, ch. 143, 22 Stat. L. 603, 631; 4 Compt. Dec. 101, note (1876-7). And when justices of the peace and other committing magistrates render services in cases of violation of the laws of the United States, though there is no statute of the United States regulating their fees, it is held that charges for such services must be made under the State or territorial fee bill. 1 Compt. Dec. 54; Senate Doc., 1906-07, No. 395, pp. 277-8.

¹⁸² Act of Feb. 25, 1796, ch. 31, 1 Stat. L. 474.

and also in the execution of the health laws of the States." The same principle was followed in the act of 1799,¹⁸³ which is substantially in force at present,¹⁸⁴ in which it is required that the quarantine and other restraints "which shall be required and established by the health laws of any State, or pursuant thereto, respecting any vessels * * * shall be duly observed" by such officers, and they are directed faithfully "to aid in the execution of such quarantines and health laws." These acts are not only a recognition of the inherent police powers of the States, but they also make the State laws rules of action for officers of the United States. The object of such legislation was "to conform the custom-house regulations of the United States to the quarantine laws of the different States, so far as this could be done consistently with the safety of the revenue; to command the assistance of the officers of the United States in the enforcement of those State laws."¹⁸⁵ It "clearly recognizes the quarantine laws of the States, and requires of the officers of the treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws enacted after the passage of that statute, as well as to those then in existence."¹⁸⁶ But nevertheless the courts do not suggest that any delegation of legislative power has been attempted.

3. Finally, State criminal laws too do service as laws of the United States. By an act of 1825¹⁸⁷ it is required that persons committing offenses in any place ceded to and under the jurisdiction of the United States, the punishment of which is not provided for by the laws of the United States, shall receive the same punishment as the laws of the State in which the place "is situated, provide for the like offense when committed * * * within such State." The reasoning upon which Chief Justice Marshall based the decision in *United States v.*

¹⁸³ Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 619.

¹⁸⁴ Rev. Stats., secs. 4792-6.

¹⁸⁵ Quarantine at Alexandria, 2 Op. Atty.-Gen., 263, 264 (1829).

¹⁸⁶ *Morgan v. Louisiana*, 118 U. S., 455, 30 L. Ed., 237, 242 (1886). See also *Bartlett v. Lockwood*, 160 U. S. 357, 40 L. Ed. 455, 457 (1896). For legislation containing the same principle see Act of Feb. 28, 1803, ch. 10, sec. 3, 2 Stat. L. 205; Act of Apr. 29, 1878, ch. 66, sec. 2, 20 Stat. L. 37. 20 Op. Atty.-Gen. 467; Act of Feb. 15, 1893, ch. 114, sec. 3, 27 Stat. L. 449.

¹⁸⁷ Act of Mar. 3, 1825, ch. 65, secs. 1, 3, 4 Stat. L. 115.

Paul¹⁸⁸ is not reported, but the court decides that this provision "is to be limited to the laws of the several States in force at the time of its enactment." And this "has been accepted as the law from that day to this."¹⁸⁹ Indeed the later acts of congress on the subject expressly refer to the State laws "now in force."¹⁹⁰ Doubtless the chief justice considered an unconstitutional delegation of legislative power involved in a prospective construction of the provision,¹⁹¹ and this objection was later expressly stated in *United States v. Barnaby*.¹⁹² In *United States v. Curran*¹⁹³ the provision was held not to apply to States admitted since its enactment. Similar legislation,¹⁹⁴ subjecting persons convicted of certain crimes on reservations in South Dakota "to the same penalties and punishment as are other persons convicted of either of said crimes under the laws of the State of South Dakota," has been interpreted in a similar manner: "It employs the present tense. * * * It does not purport to delegate to the State * * * authority at any time in the future, to fix *ad libitum*, the punishment of federal offenses. This it could not do. Congress seems to have been willing to adopt the punishment as fixed in 1903 by the laws of South Dakota * * * and such adoption was, in our opinion, competent legislation."¹⁹⁵

But this doctrine has not been applied to certain other legislation of this nature. An act of 1834¹⁹⁶ provides that criminals convicted of offenses against the United States, confined in State or territorial prisons "shall * * * in all respects be subject to the same discipline and treatment, as convicts sentenced by the courts of the State or Territory * * * and while so confined therein, shall also be exclusively under the control of the officers having charge of the same, under the laws

¹⁸⁸ 6 Pet. 141, 8 L. Ed. 348 (1832).

¹⁸⁹ *Hollister v. United States*, 145 Fed. 773, 779 (1906). See also *United States v. Barney*, Fed. Cas., No. 14, 524, p. 1013 (1866).

¹⁹⁰ Act of Apr. 5, 1866, ch. 24, sec. 2, 14 Stat. L. 12, Rev. Stats., sec. 5391; Act of July 7, 1898, ch. 576, sec. 2, 30 Stat. L. 717.

¹⁹¹ Cf. above, pp.

¹⁹² 51 Fed. 20, 23 (1892). See also House Ex. Doc., 1893, No. 14.

¹⁹³ *Ibid.*, p. 5.

¹⁹⁴ Act of Feb. 2, 1903, ch. 351, sec. 3, 32 Stat. L. 793.

¹⁹⁵ *Hollister v. United States*, 145 Fed. 773, 779 (1906).

¹⁹⁶ Act of June 30, 1834, ch. 163, 4 Stat. L. 739, Rev. Stats., sec. 5539.

of the said State or Territory." Likewise, an act of 1870¹⁹⁷ entitles the convicts "to the same system of credits for good behavior as other persons confined in the same prison." Apparently no objection has been raised against the prospective operation of these provisions but this has been assumed in various judicial decisions.¹⁹⁸ The same¹⁹⁹ is true of the enforcement act of 1870, both as to the sections repealed in 1894²⁰⁰ which in effect adopt State laws in reference to federal elections by adding penalties to the breach thereof,²⁰¹ and as to the sections which, after specifying penalties for certain offenses under the act, direct that offenders against other provisions of the act "shall be punished for the same with such punishments as are attached to the said felonies, crimes and misdemeanors by the laws of the State in which the offense may be committed."²⁰²

* * *

It then appears from this discussion that although the accepted doctrine in regard to the unconstitutionality of the delegation of legislative power has never been expressly denied in this connection, but at times has been clearly stated and strictly applied, more often there have been attempts to avoid a conflict with the theory by indirect legislation or forced construction, or the theory has been utterly ignored, with the result that relations between the Union and the States, supposedly determined by the Constitution, have been altered by the action of congress.

¹⁹⁷ Act of June 14, 1870, ch. 128, 16 Stat. L. 151, Rev. Stats., sec. 5544.

¹⁹⁸ E. g., in re Willis, 83 Fed. 148, 150 (1897); in re Walters, 128 Fed. 791, 795 (1904).

¹⁹⁹ E. g., in re Coy, 31 Fed. 794; 32 Fed. 542; 127 U. S., 731, 32 L. Ed. 274 (1887); United States v. O'Connor, 31 Fed. 449 (1887); United States v. Logan, 45 Fed. 872, 888 (1891); Motes v. United States, 178 U. S., 458, 44 L. Ed. 1150, 1151 (1900). But see the objections to such legislation made by the commission to revise the criminal law of the United States. Senate Doc., 1900-1, No. 68, Part 2, p. viii.

²⁰⁰ Act of Aug. 8, 1894, ch. 25, sec. 1, 28 Stat. L. 36.

²⁰¹ Ex parte Siebold, 100 U. S., 371, 25 L. Ed., 717, 723 (1879).

²⁰² Act of May 31, 1870, ch. 114, secs. 5-7, 16 Stat. L. 140, Rev. Stats., secs. 5507-9.

THE LAW OF IMPEACHMENT IN THE UNITED STATES

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When the Fathers were framing the Constitution of the United States they sought at every turn to safeguard the interests of the people and at the same time secure to officials a reasonable degree of independence. This solicitude was especially manifest in the case of judicial officers, whose terms were made to run during good behavior. Impeachment was the method adopted to determine what constituted misbehavior. Chief Justice Marshall early laid down the principle that terms otherwise undefined in the Constitution were used in the sense which was well known and accepted at the time the Constitution was written.¹ Impeachment was adopted and adapted from the English practice. To understand our own law, then, it is necessary to know what the English law of impeachment, the *lex et consuetudo parliamenti*, was at the time of its adoption and in what way it was modified or changed in being adopted.

"Impeachment" was a term as well known as "felony" or "levying war." It was a sort of political trial, generally used to reach offenders who might have escaped indictment at the common law. It was designed both to protect the state and to punish the offender. The custom was for the commons to make accusation at the bar of the lords, who were judges of the law and facts and fixed the penalty. All the king's subjects were liable to impeachment, whether officials or not, and for any offense. Another method of punishment closely allied to that of impeachment was that of attainder, wherein the parliament made the law and fixed the penalty to suit the case before them.

In adopting impeachment the Americans did so with certain modifications. In the first place it is to be noted that they rejected attainders outright. They also limited the offenses for which one could be im-

¹ Burr Trial, quoted in Swayne Trial, 376.

peached to treason, bribery, or other high crimes and misdemeanors. This was felt to be necessary because the commons had sometimes impeached for trivial offenses. Treason is defined in the Constitution. The other impeachable crimes and offenses are not and for their definition recourse must be had to the common law. This seems to be universally admitted, though, to be consistent, it would seem that those who deny a common law jurisdiction to the United States would also have to deny the use of the common law for purposes of definition. Bribery is a term so well known that it needs no discussion. High crimes and misdemeanors is a term less definite, but it is generally used to cover offenses not given a particular name by law. Such offenses may arise from a violation of either common or statute law. Our supreme court early held that the United States courts have no common law jurisdiction (a decision which has not been rigidly followed), but at the time of writing his *Commentaries* Mr. Justice Story said: "However much it may fall in with the political theories of certain statesmen and jurists to deny the existence of a common law belonging to and applicable to the nation in ordinary cases, no one has yet been bold enough to assert that the power of impeachment is limited to offenses defined in the statute book of the Union as impeachable high crimes and misdemeanors."² Mr. G. T. Curtis even went so far as to say that officials were impeachable "where no offense against positive law has been committed."³ In the Johnson trial, however, Mr. B. R. Curtis, one of the counsel for the defendant, seems to have been of opinion that, to be impeachable, a high crime or misdemeanor must arise from a violation of a statute of the United States.⁴ A sufficient answer to this may be found in the statement that such was not the law in England, that the English law of impeachment was adopted entire, except wherein it was changed by our Constitution, and that there is nothing in the Constitution which changes the law in this respect. It is not held that the common law may be resorted to for a jurisdiction not given by the Constitution or laws; but, when a jurisdiction is given, as it is in impeachments, it is to be exercised according to the principles of the common law. In our first four

² *Commentaries on the Constitution of the United States*, sec. 797.

³ *History of the Constitution of the United States*, ii, 260f.

⁴ Johnson Trial (Supp. to Globe, 40 Cong., 2 Sess.), 134.

trials not a single charge rested upon a statutable offense and the same was true of some of the articles in most of the other trials.

A question closely related to this is whether the crime must be committed in the discharge of official duties. Messrs. Higgins and Thurston, counsel for the respondent in the Swayne trial, endeavored to draw a distinction between judicial and political offenders, holding that the former were impeachable only for crimes committed in the performance of official duties, but, by implication at least, that this was not true of the latter. This novel conclusion was reached by an examination of English and American precedents, which, according to the defense, show that impeachment accusations against judges have been limited, "with the greatest strictness, to the acts of judgment performed by the judge on the bench." The defense admit that bribery is an exception.⁵ Dr. Hannis Taylor, evidently the author of the argument for the defendant in the Swayne trial, the authorship of which was disavowed by Higgins and Thurston, also excepts treason. In a sentence which begs the whole question, he says that, previous to the Swayne trial, the "house of representatives, in drafting its articles, adhered with the greatest strictness to the English rule, which provides that the *judicial acts* [italics ours] constituting high crimes and misdemeanors must be committed by the judge, on the bench, while in the actual administration of justice." In support of this statement he says that, previous to the Swayne trial, all charges against American judges were for judicial misconduct, except in the case of Humphreys, who was charged with treason, and "then, strangely enough, he was charged with judicial misconduct while sitting on the bench of a court of the Confederate States." A fact which the distinguished publicist thinks adds peculiar force to his contention.⁶

The writer would like to know how "judicial acts constituting high crimes and misdemeanors" or any other kind of judicial acts can be committed anywhere except on the bench, unless an attempt to administer justice "in vacation" be considered an attempt to do so off the bench. Nor is it clear that such an English rule as that quoted above has ever been established. If so, and judges are impeachable only under that rule, the whole question is settled. The rule is deduced by

⁵ Swayne Trial (S. Doc. 194, 58 Cong., 2 Sess.), 385, 389.

⁶ The American Law of Impeachment, *North American Review*, vol. 180, p. 510f.

the writers referred to from the history of judicial impeachments in England, which, it seems, does not show that any judge was ever actually impeached except for judicial misconduct.

But the whole case is given away by the defense in the Swayne trial. "Excepting bribery," they say, "there is no case in the parliamentary law of England which gives color to the idea that the personal misconduct of a judge, in matters outside of his administration of the law in a court of justice, was ever considered or charged to constitute a high crime and misdemeanor. When the question is asked by what means is the personal misconduct of an English judge, not amounting to a high crime and misdemeanor, punished, the answer is easy." And the answer is by address of both houses of parliament since the passage of the act of settlement in 1701.⁷ But it is not shown that this act forbids impeachment of judges for other than official conduct. The truth seems to be that it simply provides a more summary way of removal than that of impeachment since their commissions run during good behavior. Six State constitutions, five of which were adopted before the Federal Constitution, are then quoted to show that these States adopted this view, since they provided for removal both by impeachment, and by address "for any reasonable cause which shall not be a sufficient ground for impeachment." Now if this means anything, it simply means that these States adopted the two English methods of determining "good behavior," which was the tenure adopted for the judges. Then, as if utterly to destroy their case, Messrs. Higgins and Thurston quoted the debates in the convention of 1787 to show that that body expressly and purposely adopted one method, that of impeachment, and rejected the other, that of address. Since they at the same time adopted the tenure of good behavior, it would be strange indeed if they purposely crippled themselves in determining what was not good behavior. The constitution of New York, said to have been the model on this subject in the convention of 1787, omits removal on address. All of which goes to show that impeachment was considered a sufficient means for determining good behavior and that

⁷ Swayne Trial, 385. The evidence that Dr. Hannis Taylor is responsible for all of these ideas consists in the fact that, in his *North American Review* article, he uses several excerpts from the argument of the defense in the Swayne trial without using quotation marks or giving anybody credit for them.

removal on address was believed to be too summary and likely to become an instrument of party vengeance. Surely no one will assert that the members of the convention of 1787 would have maintained that any man who was guilty of high crimes and misdemeanors not connected with the discharge of his official duties was fit to administer the affairs of state.

It has been urged that the ordinary courts can deal with such offenders. So can they deal with treason and bribery, both of which are admitted to be impeachable offenses when not committed in the discharge of official duties. Why this difference? Besides, there is a highly practical side to the question. Suppose that a federal judge has been convicted in a State court and confined to the penitentiary: his office is not thereby vacated, a fact to which Mr. Dallas called attention in the Blount trial.⁸ We are then reduced to the absurdity, *reductio ad horribile* as Dr. Taylor would call it, of supposing that he must be allowed to continue in office, though it is impossible for him to perform the duties thereof. Instead, however, of revealing an omission in our Constitution, as Dr. Taylor holds, this only shows that the convention considered impeachment a sufficient means of reaching treason, bribery, or other high crimes and misdemeanors, whether committed in the discharge of official duties or not.

Such seems to have been the interpretation put upon the power of impeachment since the adoption of the Constitution, without distinction between political and judicial officers, though at times certain persons in whose interest it was to do so have denied it. In the Blount trial Messrs. Dallas and Ingersoll, counsel for the defendant, entered the plea that their client had not committed the offenses charged in connection with his duties as a senator and that crimes not committed in an official capacity were not impeachable.⁹ In support of this they quoted several State constitutions, among them those of New York and Massachusetts, which expressly limited impeachable crimes to those committed in the performance of official duties. Again it may be observed that this is negative proof of the impeachability of other than official crimes, since the convention, in following the constitution of New York, omitted this feature of it. Messrs. Bayard and Harper,

⁸ Ann. 5 Cong., 2267.

⁹ *Ibid.*, 2247, 2282, 2287f.

managers for the house, ably maintained that impeachment was not limited to official acts.¹⁰ The senate cannot be said to have decided one way or the other on this point. Two of our ablest commentators have sided with Bayard and Harper.¹¹

The next three impeachments, those of Pickering, Chase, and Peck, were judicial, and in each case the accused was charged only with official crimes. In 1862 seven articles of impeachment were presented against Judge West H. Humphreys, of Tennessee, not one of which charged him with misconduct on the bench, though one, and only one, did charge him with official misconduct in refusing to hold court. Several of the articles charged him with advocating secession in a public speech, levying war against the United States and with certain things done while sitting in an illegal tribunal "called the district court of the Confederate States," but it would be absurd to say that such acts were official crimes. They fall either under the head of treason or of high crimes and misdemeanors,¹² not one of which, except treason, was indictable. One of the articles against Andrew Johnson, the tenth, which charged him with a high crime and misdemeanor because of speeches denouncing the Republican majority in congress, had nothing whatever to do with his official conduct, except in so far as he was "unmindful of the high duties of his office and of the dignity and proprieties thereof." In 1873 the house of representatives began proceedings against Judge Busteed, of Alabama, with a view to impeachment for not residing within his district. When the committee of investigation reported that the only evidence he had of residence in the State consisted in "a carpet, a music box, and a double-barreled gun," the judge resigned and the proceedings were dropped.¹³ Wm. W. Belknap, secretary of war in 1876, was impeached for corruption in office. The next case was that of Judge Swayne, 1904-05. In this the managers, following the English and American precedents, did not confine themselves to official misconduct, but charged him with certain high crimes and misdemeanors which had no connection with the administration of justice.

¹⁰ *Ibid.*, 2261, 2300.

¹¹ Curtis, *History Constitution*, ii, 260f.; Story, *Commentaries*, sec. 804.

¹² Extracts from the Journal of the Senate in Cases of Impeachments (Washington, 1904), 183ff.

¹³ Swayne Trial, 605f.

Nothing is to be gained by an examination of impeachments that have occurred in the commonwealths and showing that they were for mal-administration. Several such trials have occurred in Massachusetts, New York, Pennsylvania, North Carolina, and Mississippi, but in each of these States impeachment was expressly limited to official misconduct.¹⁴

Nor can anything be gained by resorting to the antiquated doctrine of strict construction and holding that, since the power to impeach for crimes committed out of an official capacity has not been expressly conferred, it must be denied. It is only necessary to point out once more that the whole English law of impeachment was adopted except in so far as it was modified in the Constitution. The fact that removal on address was rejected in the convention, as also the express provision limiting impeachments to crimes committed in an official character, is only added proof that there was no intention to make such a limitation in the Constitution. Something more than negative proof on the English law is needed to convince that judges are not impeachable except for official high crimes and misdemeanors. No distinction is really made in the act of settlement between political and judicial offenders. To establish a difference in custom it is not sufficient to show that judges never have been impeached except for official misconduct; it must be shown that some cases occurred in which they were charged with high crimes and misdemeanors not committed in connection with their offices and that parliament expressly refused to impeach them. Until this is done the contention that American judges are not impeachable except for official misconduct cannot be regarded as established. It seems hardly so much as doubtful that English judges were impeachable for other than official crimes. In 1667, the commons authorized their committee to "receive information against the Lord Chief Justice Keelying for any other misdemeanors besides those concerning juries."¹⁵ It may be that they had in mind only judicial misconduct, but the language is general. As already pointed out in the brief history of American impeachments, the power to try for other than official crimes has not been regarded as doubtful;

¹⁴ Johnson Trial, 49f.; Ann. 8 Cong. 1 Sess., 848; Garner, *Reconstruction in Mississippi*, 401ff.

¹⁵ Ann. 8 Cong., 2 Sess., 648.

or if doubtful, we have established a custom of our own. Without drawing any distinction between political and judicial impeachments, since there is none, out of eight trials, four were based upon charges of unofficial crimes. Out of five judicial trials, including that of Judge Swayne, two brought up unofficial crimes. Only two convictions have ever resulted, and in one of these Judge Humphreys was convicted on charges which had nothing to do with his official conduct.

An important question is, who may be impeached. The State constitutions adopted before the meeting of the federal convention show no uniformity on this point, but the most of them reveal an intention to limit the English law, according to which all the king's subjects were impeachable, whether in office or not, even if they had never held office. Pennsylvania provided that an officer might be impeached "either when in office or after his resignation." Delaware and Virginia would not allow the impeachment of the chief executive while in office and in the former all impeachments must be begun within eighteen months after the offense was committed, or in the case of the chief executive, within eighteen months after he left office. It is not expressly so stated, but the inference is that all officials of these two States were impeachable when out of office. Massachusetts, New Hampshire, and New York simply provided for the impeachment of officials with no hint as to whether they were subject to trial after resignation or the expiration of their terms. Nothing is said about private citizens, but as the constitutions made the State officials liable to impeachment and provided the means for their trial, saying nothing about private citizens who had never held office, the presumption is that they were not impeachable. But the constitution of Virginia was less specific. It said: "The governor, when he is out of office, and others offending against the State, either by maladministration, corruption, or other means, by which the safety of the State is endangered, shall be impeachable by the house of delegates." Certainly there is nothing here which changed the English law making private citizens impeachable. However, the penalties allowed imply that the impeached was an official.¹⁶

The Constitution of the United States provides for impeachments,

¹⁶ These provisions may be found in Poore's *Charters and Constitutions*.

but nowhere specifically names any class as liable to such trials. In the Blount trial Mr. Bayard, one of the managers, boldly maintained that even private citizens were impeachable and that they might be deprived of their political rights in this way before they ever held office.¹⁷ The contention seems to have made a deep impression at the time. The next day after Mr. Bayard's speech, Mr. Jefferson, the vice-president, wrote to Mr. Madison: "I think that there will not be more than two votes north of the Potomac against the universality of the impeaching power."¹⁸ As Madison was so prominent in the formation of the Constitution his opinion is worthy of respect. In reply he said: "The universality of this power is the most extravagant novelty that has been broached."¹⁹ The only clause which seems to limit this universality is that which says that "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors." Another clause forbids judgment extending beyond removal from office and disqualification to hold office in the future. One disposed to a liberal interpretation might hold that private citizens were liable to impeachment and disqualification, but no one seems to have maintained this view since Bayard. It is now generally conceded that only officials are subject to impeachment.

A more important question is, when may the official be impeached. Since removal from office is made obligatory by the Constitution in case of conviction, some hold that, to be impeachable, the accused must be still in office. Such is the view of Story: "If, then, there must be a judgment of removal from office, it would seem to follow that the Constitution contemplated that the party was still in office at the time of impeachment. If he was not his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued, with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offense, when the most important object for which the remedy was given was no longer necessary or attainable."²⁰

¹⁷ Ann. 5 Cong., 2251, 2254.

¹⁸ Quoted in the Belknap Trial (Cong., Rec., 44 Cong. 1 Sess., vol. 4, pt. 7), 157.

¹⁹ *Ibid.*

²⁰ *Commentaries*, sec. 804.

It is true that the most important object of impeachment is to remove the offender from office, but it may be very necessary to deprive him permanently of his political rights, which can be done only by impeachment. It is indeed "not so much designed to punish an offender as to secure the State," nevertheless it is a punishment. The disgrace attending such a condemnation certainly would weigh heavily upon any man. The offender may not have committed an indictable offense; shall he then be allowed to go scott free, if he vacates his office? It is also true that impeachment "touches neither his person nor his property," yet it is a proceeding directed against a person, not an officer as such. If a suit is brought against an officer to recover money illegally collected, it lies against him as a person when out of office as well as when in. His successor could not be touched for it. There certainly is some analogy between this and impeachments. Again, a man may have committed an indictable offense. Feeling that condemnation followed by the full penalty would be the result of impeachment, he might prefer to resign and suffer the penalties imposed in a court of law, trusting to the president or a State executive to remove his disabilities by pardon, a thing which cannot be done in cases of impeachment. In this way the whole object of impeachment could be defeated. A case in point is that of Belknap, where an upright president assisted in the defeat of an impeachment by accepting the resignation of the accused.

The history of the views on this question will be of interest. The question first arose in the Blount trial. In this case the house followed the strange course of accusing the senator of certain high crimes and misdemeanors and demanding at once that he be "sequestered from his seat," promising at the same time to present articles of impeachment at a later day. In response to this demand the senate expelled Blount with only one dissenting vote.²¹ When the articles were drawn up and Blount was ordered to appear, his counsel made answer by pleading to the jurisdiction of the senate on the ground that senators were not officers within the meaning of that term as used in the Constitution and that if they were, Blount was no longer subject to impeachment because no longer a senator. However, the defense expressly

²¹ Ann. 5 Cong., 1 Sess., 39, 44.

stated that they referred to vacation by expulsion. Said Mr. Ingersoll, one of the counsel for the defendant, "I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office."²²

The senate cannot be said to have registered its opinion on this point in case of either voluntary or forced vacation. A resolution to the effect that Blount was an officer and therefore impeachable was negatived by a vote of 11 to 14. The defendant's plea was then sustained by a vote of 14 to 11.²³ The most natural interpretation of this action is that the senate thought its members not impeachable. Jefferson predicted that such would be the decision.²⁴ This view accords with the teachings of political science, in which the holding of legislative powers is called mandate.

During the progress of the Chase trial the defense labored to prove that only officers were impeachable, which really had nothing to do with the case, and this was cheerfully admitted by the managers.²⁵ But it is not clear that they had ex-officials in mind. Rather they were thinking of private citizens as contrasted with officials.

Charges of corruption in office were brought against Daniel Webster in the house of representatives in 1846, though he had been out of office several years. The house then ordered the appointment of a committee to inquire into the charges "with a view of founding an impeachment against said Daniel Webster." Only one man, Mr. Bayley of Virginia, appears to have recorded any doubt at the time that ex-officials were impeachable. Said J. Q. Adams: "I hold, therefore, that * * * every officer of the United States impeachable by the laws of the country is as liable twenty years after his office has expired as he is while he continues in office."²⁶ The proceedings were dropped simply because the evidence did not warrant their continuance.

The charges against Judge Busteed, of Alabama, were dropped in 1873, apparently because the crime with which he was charged, that of violating the law requiring residence within his district, was not

²² *Ibid.*, 2278, 2293.

²³ *Ibid.*, 2318f.

²⁴ Quoted in Belknap Trial, 157.

²⁵ Ann. 8 Cong., 2 Sess., 594.

²⁶ Quoted in Belknap Trial, 151.

serious enough to warrant impeachment after he had resigned. But in the Belknap trial the house and senate found themselves face to face with the question whether a man could escape impeachment by resigning. Wm. W. Belknap was secretary of war under President Grant in 1876. March 2 he realized that impeachment for corruption in office was certain and resigned about two hours before it was voted in the house, his resignation being immediately accepted by the president. But the house refused to consider their proceedings estopped thereby and voted to impeach without a division. At first the accused contented himself with pleading to the jurisdiction of the senate. His plea was simply that only officials were liable to impeachment and that he was not then, nor at the time the impeachment was voted, an officer of the United States.²⁷

Nearly three months were consumed in the preparations for the trial and in the settlement of the question of jurisdiction. This question was argued ably and at length on both sides, after which the senate sustained the contention of the house by a vote of 37 to 29, 7 not voting. The presiding officer ruled that the jurisdiction of the senate was sustained, but the respondent pleaded that it was not, since less than two-thirds, the number necessary to convict, had voted yea, and begged that the case be dismissed. The issue thus raised came to a vote on a resolution to proceed with the trial as upon a plea of not guilty, if the accused failed to make answer, and the result was 21 yeas, 16 nays, 36 not voting.²⁸

The trial then proceeded. For a while the counsel for the respondent refused to take any part in it, but finally decided to make some sort of a defense. In their final speeches, however, they still held that the senate had denied jurisdiction and that no senator who had so voted could now vote for condemnation without stultifying himself. Mr. Lynde argued the case well for the managers, pointing out the analogous practice of the courts, where any preliminary decision of the majority was binding upon the minority; that after a question of jurisdiction had been decided affirmatively, the minority were then bound to try the case on its merits. Orders of the senate were regularly passed by simple majority and were then binding upon all. A precedent in

²⁷ *Ibid.*, pp. 111 and 6f.

²⁸ Belknap Trial, 76, 173f.

impeachments, that of Judge Barnard, was referred to, where nine men had voted against assuming jurisdiction on certain charges relating to a previous term, but after the jurisdiction was sustained had voted for condemnation. (However, jurisdiction was sustained by a two-thirds vote.) It may be objected that, while the supreme court decides all questions by simple majority vote, the senate can convict only by two-thirds, hence a similar vote is necessary to sustain jurisdiction. But Mr. Lynde pointed out that questions no less vital to the issue were decided by a simple majority; for example, in the Johnson trial evidence was admitted fifteen times when less than two-thirds had voted for its admission.²⁹ Two senators who had voted against jurisdiction were convinced and answered "Guilty" on the question of guilt, but the rest refused to try the case on its merits and answered "Not guilty," giving as their reason for doing so, not the innocence of the accused, but their belief that the senate had no jurisdiction to try him.³⁰

A few somewhat similar cases have occurred within the commonwealths. In 1796 the general assembly of North Carolina instituted impeachment proceedings against the secretary of state for corruption in office, whereupon he resigned and "superseded the necessity of an impeachment." The proceedings were then dropped and he was afterwards indicted at common law.³¹ The constitution said nothing about the time when officers were liable to impeachment, as did some of the others, neither did it prescribe the penalty. In 1876 the legislature of Mississippi, which had been elected in the "Revolution" of the preceding year, began impeachments proceedings against several members of the carpet-bag government. The lieutenant-governor was impeached for bribery. "He attempted to resign, but the senate proceeded with the trial," with conviction as the result. The governor and the superintendent of education were allowed to resign. Among the charges brought against the latter was one for misfeasance in office while clerk of the circuit court, an office which he no longer held.³² In 1893 the legislature of Nebraska in joint assembly impeached the attorney-

²⁹ *Ibid.*, 295ff.

³⁰ Belknap Trial, 343f.

³¹ Ann. 8 Cong., 1 Sess., 848.

³² Garner, *Reconstruction in Mississippi*, 403ff.

general before the supreme court, but that body dismissed the case, remarking that, since he was already out of office (by expiration of term), it was better that the State should be confined to the remedy afforded by the criminal code.³³

Out of eight trials before the United States senate only two convictions have ever followed. In the first case Judge Pickering was simply removed from office; in the second Judge Humphreys was both removed and disqualified to hold office in the future. The first is a necessary incident of conviction; the second is discretionary. Since removal is made mandatory in the Constitution, it is at least doubtful if a formal vote is necessary to accomplish this result. There seems to be no reason why the presiding officer may not pronounce judgment of removal as a necessary consequence of conviction, but the custom of the senate is against it. A formal vote was taken in the cases of both Pickering and Humphreys. In the first case Judge Pickering was condemned by a vote of 19 to 7. The vote to remove from office was 20 to 6.³⁴ On two of the articles against Judge Humphreys the vote stood 39 to 0; on one, 28 to 10. On motion to add disqualification to hold office to the penalty of removal the result was 27 to 10. The presiding officer ruled that the question was still divisible and put each part separately. On the question of removal the result was 38 to 0; on that of disqualification, 36 to 0.³⁵ In the course of the Johnson trial a resolution was offered by Mr. Sumner, the implacable enemy of the president, declaring that the requirement of a two-thirds majority did not extend to disqualification, but it never came to a vote³⁶

The question as to whether an impeachment trial is terminated by a dissolution of congress has never been raised in a practical way. In 1679 the lords determined that an impeachment was not terminated by a dissolution of parliament. This decision was reversed in the case of Danby in 1685, four parliaments having dissolved without bringing the accusation to an issue. The question was raised again in the trial of Warren Hastings. After able arguments on both sides the decision

³³ *State v. Hastings*, 37 Neb. Rep., 96.

³⁴ Ann. 8 Cong., 1 Sess., 367.

³⁵ Extracts from Journals of Senate, etc., 183ff.

³⁶ Johnson Trial, 331, 410.

of 1685 was reversed by large majorities in both houses and the decision of 1679 was declared to be the law of the land.³⁷

This last decision was made in 1791. Did we in our Constitution of 1787 adopt the rule of 1685? Subsequent changes in the English law can have no effect on our own. It has already been stated that we adopted the English law of impeachment as it existed in 1787, with a few changes. Although no mention was made of this particular point, the writer is not inclined to believe that impeachments are to be regarded as terminated by a dissolution. In the first place it is doubtful if the decision of 1685 ever really was the law in England. In the second, the analogy between impeachments and bills does not hold. It was argued that all bills fail by a dissolution and must be introduced *de novo* in the next house. But an impeachment is not a bill, neither is a court of impeachment a legislative body. Cases are not thrown out of our courts even by a change of judge and jury, much less by a change of prosecuting attorneys. The senate sitting as a court of impeachment is a court of record; the senate may be called a permanent body. Only the prosecutor, the house, changes by a dissolution. What need is there, then, for it to begin an impeachment *de novo*?

The question whether an offense to be impeachable must also be indictable was raised by Judge Chase in his trial and the affirmative side was ably argued by his counsel, one of whom, Luther Martin, had sat in the convention of 1787, but had gone home in disgust without signing the Constitution. It does not appear to have been raised in the Blount and Pickering trials, but it was raised in that of Judge Addison, an officer of the State of Pennsylvania in 1802-03. In his defense the judge held that "an impeachment lies only where an indictment lies," and seems to have relied mainly upon the fact that removal by address was provided for in cases where there was not sufficient ground for impeachment. But he was convicted by a vote of 20 to 4. This case was cited at length by Mr. Rodney, one of the managers in the Chase trial, who was ably supported by Mr. Nicholson in holding that an offense to be impeachable need not be indictable. Mr. Harper one of the counsel for Chase, practically abandoned the contention of

³⁷ Hallam, *Constitutional History of England*, ii, 173-177.

his client.³⁸ Judge Chase was acquitted, but there is no evidence that the senators thought his contention in this matter correct. Judge Peck seems to have conceded that one might be impeached for crimes not indictable, but held that the act must be wilfully and knowingly done in violation of law" with malicious intention.³⁹ It is doubtful if more than one of the crimes charged against Judge Humphreys was indictable. In the Johnson trial the defense did not claim that only indictable offenses were impeachable, but the managers argued the negative side at length⁴⁰ As Belknap was already under indictment at the time of his trial there was no need to discuss the question. The counsel for Judge Swayne took about the same ground as did Judge Peck. They also asserted that some crimes, both in England and America, were indictable which were not impeachable and that for these the remedy was to be found in a regular court of justice.⁴¹ This is undoubtedly true in America, but one may assert with equal positiveness that it was not true in England, where anything was impeachable which parliament so regarded.

While the Constitution names the crimes for which one may be impeached, the senate sitting as a court of impeachment is the sole judge of what offenses fall within the category of "treason, bribery, or other high crimes and misdemeanors." Treason is defined in the Constitution and that definition cannot be enlarged upon. Bribery is a term upon the meaning of which there is supposed to be substantial agreement, yet this is capable of enlargement by constructive interpretation according to the contention of the managers in the Johnson trial, who held that the president's promise to General Thomas to assume responsibility for violation of the tenure-of-office act was bribery. But "high crimes and misdemeanors" is more open to interpretation than either of the others. It rests with the senate alone to say what are impeachable high crimes and misdemeanors. They must do this according to the common law and parliamentary practice, but of these they are the sole judges. From their decision there is no appeal.

The question naturally arises here as to what majority is necessary

³⁸ Ann. 8 Cong., 2 Sess., 432, 593, 602, 606, 643, 507.

³⁹ Extracts, etc., 80.

⁴⁰ Johnson Trial, 17, 46ff.

⁴¹ Swayne Trial, 393.

to determine whether the crime charged falls within the category of impeachable offenses. The matter has never been presented to the senate in just this form. An analogous question was that of jurisdiction in the Belknap trial, which has already been discussed at length. To the layman it looks as if the question ought to have been raised in the Swayne trial. The judge was charged with high crimes and misdemeanors in obtaining money from the United States by a false pretense, using without compensation the property of a railroad which was in the hands of a receiver appointed by himself, not residing within his district as required by law, and maliciously and unlawfully fining for contempt of court. The defense maintained that even if true, the allegations did not constitute an impeachable offense.⁴² There seems to have been very little doubt that the accused was guilty of some of the things charged, but he was acquitted. The impression of the public seems to have been that the judge was acquitted because the senate did not think that his peccadilloes amounted to impeachable high crimes and misdemeanors. The proper course, then, would have been for the defense to have entered a demurrer and called for a ruling on the impeachability of the crimes charged. If not sustained, the case could then have been tried on its merits. Even if a two-thirds majority were required to settle such a question, the time and expense of a trial might be saved by settling it in advance.

The framers of the Constitution wisely provided that in the trial of the president the chief justice should preside, because the vice-president would be interested in the result. It probably never occurred to them that any senator might be immediately affected by the result, but such was the case in the Johnson trial. At that time the president *pro tempore* of the senate would have succeeded to the presidency in case of a vacancy. Senator Wade held this position at the time. No written law forbade him to participate in the trial, neither was he deterred by the law of delicacy from taking an active part and exultingly recording his vote for condemnation, a vote which, with one change, would have seated him in the presidency. Soon after the opening of the trial Mr. Sumner offered a resolution to the effect that the chief justice had no right to vote on any question during the trial.

⁴² Swayne Trial, 393f.

After this was negatived by a vote of 22 to 26, 6 not voting, Mr. Drake offered one to the effect that he had no privilege of ruling on questions of law, but that all such should be submitted to the decision of the senate alone. This was negatived by a vote of 20 to 30, 4 not voting,⁴³ from which it seems clear that the chief justice succeeds to all the rights and privileges of the vice-president.

⁴³ Johnson Trial, 63.

THE BÜRGERMEISTER, GERMANY'S CHIEF MUNICIPAL MAGISTRATE

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The title *bürgermeister* first appears in German municipal history during the early part of the thirteenth century,¹ but the exact nature of the tasks imposed upon the official at this period still remains obscured in the darkness of the Middle Ages. We know that there were such officers, and we know something as to the method of their election, but very little as to the extent of their real power. Probably, however, as Von Maurer suggests, the *bürgermeister* had originally no other duty than that of presiding over the civic council,² a simple function, to which came later to be added a general oversight of current affairs and the enforcing of city ordinances.

Considerably more, however, may be learned as to the duties of this officer in the seventeenth century, when the franchise had become more and more restricted and the number of town officers much smaller, and when, partly as a result of this decrease and partly in consequence of the awakening industrial life of the period, there had come to be an increase in the importance of town officials, and naturally among the rest in that of the chief magistrate. The consent of the *bürgermeister* in all town transactions now appears necessary; and, with an ever-increasing number of requirements, it is now sometimes impossible to find suitable candidates for the office within the limits of the municipality. Accordingly strangers begin to be employed in the service, as we learn from the outcry which arose in Alt-Brandenburg in 1690, when complaint was made that too many outsiders were employed in the church, the schools, and the public service.³ That during this century the functions of the *bürgermeister* were of a varied character

¹ A. Zimmermann, *Versuch einer historischen Entwicklung der märkischen Städteverfassungen*, i, 90.

² G. L. von Maurer, *Geschichte der Städteverfassung in Deutschland*, i, 631.

³ Zimmermann, *Versuch einer historischen Entwicklung der märkischen Städteverfassungen*, iii, 12-13.

is shown by a list made out, in 1650, by Neustadt Eberwalde, in which the town set down, in general terms, the services expected from its chief magistrate. This document requires that he, together with the council, shall be diligent and shall consider how he may increase the town receipts—as for instance, through the abolition of unnecessary charges for food or travel, through repairs of mills, churches, schools, and parish buildings, as well as through the construction of sheepfolds, dairies and brickyards.⁴

Such were the petty cares which perplexed the bürgermeister of the seventeenth century. He had a general oversight, a sort of parental care, of his village; his consent was necessary for corporate action; and even at this early date he might be selected from outside the town limits. Bearing these facts in mind as we turn to our main subject of examination, the bürgermeister of today, we shall find his duties multiplied with the increasing complexity of his environment, and made exacting by the broadening scope of city government.

As in all European countries, the general council of the German municipality elects the local executive, which, throughout the empire, consists of an administrative board (the magistrat) with the bürgermeister at its head. The council itself is elected by the well-known “three-class system,” which gives to heavy taxpayers the selection of a majority of the council.⁵ In this way the conservative property owners, the men who have something to lose in case an improvident administration be installed, really elect and so ultimately control the council, which, as we have seen, elects the bürgermeister and the magistrat. This is the first point of importance to be observed—the power of the conservative element exercised in the election.

A further safeguard in the selection of the bürgermeister is the right of rejection reserved to the crown or its representatives. If the central government is displeased with the choice of the council, it may withhold its sanction and so annul the election. This veto power is so seldom exercised, however, that it acts chiefly as a deterrent force; but it has occasionally been brought into active service. In 1901, for

⁴ Zimmermann, *Versuch einer historischen Entwicklung der märkischen Städteverfassungen*, iii, 29.

⁵ For a discussion of this system, see R. C. Brooks on The Three Class System, in *Municipal Affairs*, iii, 396ff.

instance, Kaiser William, for purely personal reasons, it is said, prevented a certain candidate from becoming mayor of Berlin. In this election of *bürgermeister*, cities of over 10,000 inhabitants obtain the king's consent through the minister of the interior,⁶ smaller towns get the consent of the provincial government, but for towns of less than 2000 the assent of the *regierungs-präsident* is sufficient.

Clearly to understand the position of the *bürgermeister*, then, we must put aside any feelings of disapproval we may have in connection with the idea of a paternal central government, and any disposition to revolt against a suffrage distorted by property qualifications, and must take into account these two important checks which in a measure control his election—the three-class voting system and the necessary governmental approval of the choice.

The *bürgermeister's* salary ranges smaller than that of the American mayor in cities of corresponding size; but in making comparison one should bear in mind the lower cost of living which prevails throughout the German Empire.⁷ Leipzig, containing half a million inhabitants, employs two *bürgermeister*s, of whom Dr. Tröndlin, the *ober-bürgermeister*, receives a salary of 25,000m and serves for life, and Dr. Dittrich, his assistant, receives 18,000m, and also enjoys a life tenure. Boston, Massachusetts, with about the same population, pays its mayor \$10,000 and provides no assistant. Berlin pays its *ober-bürgermeister* 30,000m,⁸ New York, its mayor, \$15,000. This difference in compensation may be in part accounted for by the fact that in Germany considerable social prestige accompanies the office of *bürgermeister*. The universities, the technical schools, and the civil service furnish an abundant supply of trained material, and the salaries offered prove sufficiently tempting to secure men of real character and ability. That such qualities are essential to the proper administration of the German municipality will presently appear when we turn to consider the functions and power of this officer, who may in theory be simply an officer presiding over the executive council, but whose position is in practice much more important.

⁶ Walter Ledermann, *Die Städte-Ordnung*, 119.

⁷ For German cost of living, see W. J. Ashley, *Progress of the German Working Classes*, 24.

⁸ For the exact figures in all German cities, see Joseph Kürschner's *Handbuch*.

Although non-professional and unpaid members are to some extent admitted in the magistrat, the bürgermeister, as its president, finds himself for the most part associated with men familiar with every detail of local administration—with experts in finance, in education, in sanitary science, in public charity, as well as with lawyers and those skilled in forestry and park management. Over such a body the bürgermeister presides, summoning the meetings, deciding upon the order in which public business shall be considered, guiding and apparently almost completely controlling the discussion.⁹ To complete his oversight of the business of the board, he has also the right to suspend the execution of any ordinance in the passing of which he may think the magistrat has exceeded its authority, or which he may deem contrary to the welfare of the town, the right of final rejection being left to the government.¹⁰ Thus, taking all in all, the bürgermeister holds in his hands the reins which guide the magistrat; and since the magistrat has always remained legally the local executive, he more than anyone else controls the administration of the municipality. He is something more than the mere presiding officer whom one is apt to picture to one's self while reading such authors as Shaw and Fairlie, whose allusions to the office are infrequent and who hardly recognize the bürgermeister's power of guidance.

Besides controlling the magistrat as a body, the bürgermeister exercises an extensive power of direction over its individual members, as well as over local officials of every kind. There may no longer be any dairy and brickyard construction for him to supervise, but there are yet more important offices that require his attention. Every salaried member of the magistrat is chosen because of his special suitability for overseeing some public service. Take, for instance, the administration of relief for the city poor.¹¹ In no other country in the world is the dispensation of municipal charity so systematically and thoroughly organized, three thousand persons, most of them unpaid being directly employed in the distribution of outdoor and indoor relief in Berlin. This charity department, organized either under a

⁹ Ledermann, *Die Städte-Ordnung*, 511.

¹⁰ *Ibid.*, 326.

¹¹ For a detailed account of this charity, see M. Neeffe, editor, *Statistisches Jahrbuch Deutscher Städte* (1901), 255.

commission or under the armen deputation (a committee of the magistrat), remains in either case under the surveillance of the bürgermeister; and this is true of the other departments of municipal activity. It is the bürgermeister who divides up the work of administration among the deputations in the first place. Then, having assigned to each its duties, "he must see that officers and members of the magistrat perform their tasks, and that complaints respecting their conduct come before him and not before the magistrat."¹² Such authority would of course prove impotent without adequate means of enforcement; and this the German code provides by giving the bürgermeister the right to inflict fines and, in case of grave misconduct, imprisonment.¹³ The delinquent usually receives first a warning, next an open rebuke, and then, in case of further neglect, the "geldbusse," or fine, is inflicted; if this proves ineffective, he may ultimately be removed. Now, unlike many similar officials in America, the bürgermeister does not possess the privilege of appointment; he does not choose the men who in fact, if not in theory, constitute his own subordinates. Nor can he alone remove or transfer a member of the magistrat. This task is accomplished through a superior official, the regierungs-präsident; but even here the bürgermeister has a strong influence, for when delay would involve danger he may, upon his own authority, suspend the culprit, provided that he communicate the fact to the magistrat.¹⁴

Thus it appears that the bürgermeister's power of enforcement and discipline is practically coextensive with his jurisdiction; he presides over the magistrat as a body, divides up its work among its members, and sees that the work is performed. So much for his authority and his relations with the magistrat as a body. Let us consider next his official relations with the individual members of the body and of the city government, relying for information chiefly on Ledermann's edition of the *Prussian Municipal Code*, which may be regarded as giving a fair generalization of the position occupied by the ordinary German bürgermeister, though it must of course be admitted that some bürgermeisters have somewhat more authority than others over the individuals who compose the administration.¹⁵

¹² Ledermann, *Die Städte-Ordnung*, 518.

¹³ *Ibid.*, 332.

¹⁴ *Ibid.*, 518.

¹⁵ See Josef Redlich, *Local Government in England*, i, 303-304.

It is the bürgermeister, as we have seen, who divides the work of administration among the members of the magistrat, who forms the working subcommittees or "deputations," and who fixes the work of each committee. In this way are formed in each city a board of public works and construction (bau deputation), a poor relief committee (armen deputation) and a police authority (polizei behorde), so far, at least, as such authority comes under city and not state control. Thus, since the bürgermeister may rearrange the committees or dismiss members,¹⁶ he virtually controls the activity of the magistrat, even though in the first instance he has no right of appointment to that body. This, at least, is a view which seems tenable to the writer.

Analogous to his power of arranging work in the magistrat is the presiding officer's right to settle questions of "order, rank, or dignity" within that body.¹⁷ If a dispute arises as to precedence, it is the bürgermeister who decides the point. Moreover, either the bürgermeister or the ober-bürgermeister¹⁸ has exclusive oversight of the members, as well as of other inferior officers, in the execution of their several functions; and of these officers and members he may command obedience in all matters within his jurisdiction.¹⁹

One fact tending greatly to enlarge the scope of the bürgermeister's power is his right to issue executive "instructions."²⁰ Unlike the assemblies of Anglo-Saxon communities, German legislative bodies, following the ordinary continental conception of the legislative sphere of action, seem content to enact laws laying down principles, but not details, of administration. These minor matters are left for later executive determination. It is, therefore, the duty of the bürgermeister, as the code puts it, not only to see to it that all things necessary to be considered by the magistrat and requiring its coöperation be brought to its notice in the first instance, and that nothing of importance be kept from it,²¹ but also, after action has been taken by that body, frequently to interpret and supplement its orders with his own orders.

¹⁶ Ledermann, *Die Städte-Ordnung*, 517.

¹⁷ *Ibid.*

¹⁸ Many of the larger cities maintain two or even three bürgermeisters, the highest bearing the title of ober-bürgermeister.

¹⁹ Ledermann, *Die Städte-Ordnung*, 516.

²⁰ *Ibid.*, 517.

²¹ *Ibid.*

These "instructions" may either be general—that is, applicable to all officers—or they may be directed to individual cases.

Again, the bürgermeister must not only see that the magistrat preserves the necessary cohesion and that it works for the good of the community,²² but he must also prevent the presentation of retarding or conflicting orders, and must take care that an "active spirit prevails throughout the service" (verwaltung).²³ It is his duty to look from time to time into the working of the several departments. He has oversight of the city treasury and its accounts, and of the management of local banks. He must see that their regular monthly and special annual investigations are held, and it is his privilege to require special audits (kassen-revisionen) for his personal use and enlightenment. He also has charge of any important or secret documents which may be kept in the Rathaus; and in some cities the bürgermeister, or some member of the magistrat representing him, presides over the tax commission.²⁴ Still another of his duties is to post the list of sheriffs and jurymen, and to divide the town into districts over which the shiedsmänner, or local arbitrators, preside. These officials act as mediators in minor matters, and thus prevent much litigation. They serve for three years, and, although they receive no pay,²⁵ are useful and esteemed allies of the administration.

The bürgermeister's responsibility in these and other respects is worthy of note. As the municipal code expresses it, he "conducts and inspects all of the city's administrative activities,"²⁶ a supervision which is rendered much more effective in Germany than is possible in any other country by reason of the long term of service enjoyed by the chief municipal magistrate there, twelve years being the minimum. In this time the bürgermeister becomes so familiar with his city that he knows it through and through; many of its institutions having grown up under his watchful eye, he regards them largely as his own creation and takes pride in their successful operation.

Outside of his position as chief administrator, the bürgermeister

²² Ledermann, *Die Städte-Ordnung*, 516.

²³ *Ibid.*, 517.

²⁴ When no government commissioner (staats kommissar) has been appointed. See *Ibid.*, 386.

²⁵ *Ibid.*, 388.

²⁶ Ledermann, *Die Städte-Ordnung*, 331.

may to some extent be regarded as an agent of the central government and always as the official representative of the municipal corporation of which he is the head. At public ceremonies of a local character he seems to be the person most fitted to preside; and he may also become the city's legal as well as its purely official head, his oath taken in behalf of the city corporate being binding on the town.²⁷ When no officer of the central government is put in charge of the police, the bürgermeister assumes the control.²⁸ In this capacity he retains, first, the management of the local police, the most important branch of the police service; secondly, he must give assistance to the detective force (gerichtliche polizei); and, thirdly, upon him devolves the enforcement of the ordinary police power of the state—that is, the maintenance of the health, morals, and well-being of the community. In a city of such size, however, that the imposition of police functions would lay too heavy a burden on the chief magistrate, the bürgermeister may share his task with an associate (magistrats-mitglied).

Inasmuch as such extensive powers as these must inevitably, if pursued for unwise or corrupt ends, bring about an intolerable state of public affairs, means may be invoked, both administrative and judicial, for restraining the bürgermeister's activities. Before he assumes his duties, he first receives the oath of office²⁹ from the regierungs-präsident, who later may impose punishment on either the bürgermeister or the members of the magistrat. Within two weeks from such sentence, however, an appeal can be taken to the oberpräsident, with right of further appeal either to the chief administrative court (oberwaltungsgericht)³⁰ or to a special commission.³¹

Still another point from which the position of bürgermeister may be viewed appears in the fact that in Germany, as in no other country in the world, municipalities have secured the control of the public service, a circumstance which makes it doubly important that there should be a wise guidance of the local administration, and which must be constantly borne in mind by Americans if they are fully to understand the

²⁷ Ledermann, *Die Städte-Ordnung*, 44.

²⁸ *Ibid.*, 366.

²⁹ *Ibid.*, 122.

³⁰ *Ibid.*, 481.

³¹ *Ibid.*, 421.

duties of the German official. Berlin's municipal activities include the maintenance of city abattoirs and cattle markets, which are now to be found quite frequently in Germany; also the care of lodging-houses, work-houses, municipal farms, city savings-banks—a venerable institution in Germany—and municipal fire insurance. Some cities maintain cemeteries, where lots are leased for a period of twenty years or so, and where the fee for burial varies from \$0.75 to \$7.50, according to the property of the deceased. In some cases the city provides the funeral also.³²

Organized relief of the poor is also, as is well known, so firmly believed in by the Germans, that it is made one of their city activities. Every important German city has a distinct municipal charity organization, embracing both a central committee headed by a member of the magistrat and many local committees. In Berlin there are about 250 of these local committees, each consisting of from five to twelve members.

In the matter of insurance, too, the German city interests itself. Private insurance societies are in every way encouraged by the government, but at the same time they are carefully registered and supervised. Some twenty years ago municipal insurance began to be developed, and now insurance against the helplessness of old age is made compulsory on workingmen. For their benefit also there has been established a municipal savings bank, which in Berlin has 75 or more receiving offices and over 400,000 depositors. In Dresden 200,000 deposit books are outstanding.

These instances of civic enterprise are enough to show the wide field of municipal activity over which the *bürgermeister* and his colleagues of today preside. Some of the other matters with which the German cities concern themselves may be seen in the following table, printed by Dr. M. Neefe, in his edition of the *Statistisches Jahrbuch deutschen Städte* (1902):

³² James, *Municipal Administration in Germany as seen in the Government of a Typical Prussian City*, Halle a/S., 91.

NAME OF CITY.	GAS PLANTS 1899-1900.		PUBLIC BATHS 1899-1900.		MUNICIPAL THEATRES. §	
	Public.	Non- public.	Warm.	Cold.	Operated by city.	Leased.
Berlin.....	4		3	9	*	*
Hamburg.....	3		4	6		
Leipzig.....	2	5	4	3†	1	1
München.....	2	3	9	3‡		
Breslau.....	3		2		1	
Dresden.....	2	4	1	5		
Köln.....	1	2	2	1		
Frankfurt a/M.....	2		2		1	1
Hanover.....	*	*	3	1		
Magdeburg.....	1	1	3		1	
Düsseldorf.....	1		2	1	1	
Königsberg.....	1		1	3		

*Not given. †Two are leased. ‡Also military swimming baths. §In 52 cities there are 199 theatres, 30 owned by 28 cities.

Having mentioned the several functions of the bürgermeister, let us now consider the character and the records of the men chosen to fill this position, and the method of their appointment. Taking the last point first, and imagining the general council newly elected and ready to attack the problem, we shall note at once the conservative influence of its constituency. A salary such as the municipality can afford is first fixed upon, and then honest and painstaking effort is made to secure the ablest officer obtainable for that salary, and this irrespective of his home or party; for the national party organizations do not reach down into municipal life, and, as we have seen, the German people early outgrew the feeling that bürgerers alone should be bürgermeisters. On the contrary, it is customary for the rath to advertize the fact that a vacancy exists. This is usually done through the press.³³ That the candidate accepted will, in the main, prove himself a man of ability,

³³ The following advertisement is taken from the *Deutsche Gemeinde-Zeitung* of Berlin, July 21, 1906:

POSITION OF BÜRGERMEISTER VACANT

In consequence of the pensioning of the former incumbent, the position of *First Bürgermeister*, in our city, must again be filled—that is, between October 1 and January 1, 1907.

The salary, which entitles the recipient to a pension conditionally upon the consent

education, and experience may be shown by an examination of the official records of a number of Germany's bürgermeisters; and this happy result may be accounted for by the fact that able and well-trained men naturally seek a position which carries with it social elevation—as do all the official stations in the empire—especially when such distinction is combined with long official tenure, and at least a reasonable, if not a large, compensation. The salary varies of course with the size and wealth of the city. Dr. Adickes of Frankfurt, for instance, receives 30,000m, plus some additional perquisites;³⁴ and the town of Halle with its 150,000 inhabitants pays its bürgermeister 10,000m, with the addition of 1500m for expenses.³⁵ The bürgermeister usually receives either a twelve-year term or life service. If the former, he is almost always reappointed; for, if the council does not keep him in office, it is compelled to grant him a retiring pension.³⁶

In the character of the men chosen and in their fitness for office, Germany surely compares favorably with other nations, an opinion which is confirmed by the record of Dr. Bender of Breslau, for example. He was born at Königsberg, and after finishing his course at the university in his native town, went to Jena to study. In 1870, at the age of twenty-two, he entered the Franco-Prussian war, and after its termination, in 1878, was made judge of the local court (kreisricht) in Marggrabowo. In the same year he became a member of the stadtrat in

of the district committee, amounts to 7500 marks, rising after 3 years to 8000 marks, after 6 years to 8500 marks, and after 9 years to 9000 marks.

Candidate must possess experience as a judge or in some branch of important administrative service, and must have proved himself successful in the local service.

Account of Previous Service is not Without Weight.

Information including career and testimonials may, up to September 1, be presented to the undersigned.

Personal application is not, for the present, desired.

Rathenow

July 16, 1906.

By Town Appointment, the Director.

C. HEIDEPRIEM.

³⁴ Joseph Kürschner, editor, *Handbuch des Reiches und der Einzelstaaten* (1906), 1115.

³⁵ Edmund J. James, *Municipal Administration in Germany as seen in the Government of a Typical Prussian City, Halle a/S.*, 13, note.

³⁶ Ledermann, *Die Städte-Ordnung*, 418. The pension amounts to one-quarter of the salary for 6 years' service, one-half for 12 years, and two-thirds for 24.

Thorn (West Prussia), and after two years of service was appointed bürgermeister there. In 1891 Breslau chose him its ober-bürgermeister. Dr. Bender is a member of the Prussian Herrenhaus, and holds also the honorary position of Ehrenbürger of Thorn. He has also written several books.

One of the most famous German bürgermeisters is Dr. Kirschner, under whose guidance Berlin, although the most rapidly growing city in the world, continues to be one of the best administered. Dr. Kirschner was born at Freiburg (Silesia), and after completing his education, which included studies at the universities of Breslau, Berlin, and Heidelberg, he served until 1872 on various minor judicial bodies. In this year he became local judge (kreisrichter) in the town of Bromberg, and the next year entered the stadtrat of Breslau, where after six years of service in this body, the city made him its attorney (syndicus). In 1893, Berlin, influenced by Dr. Kirschner's able service in the neighboring city, offered to him the position of bürgermeister, from which he was in 1899 promoted to that of ober-bürgermeister.³⁷

Dr. Tröndlin, at present ober-bürgermeister of Leipzig, may be cited as an instance of one who has received "honor in his own country." Born in Leipzig, he studied at the university in that city, and also at Heidelberg and Berlin, till 1865, when he returned to begin the practice of law at Leipzig. In 1870 he entered the public service of the city, which in 1876 made him bürgermeister for six years, and in 1882 for life. In 1899 it bestowed on him the highest honor in its power, the position of ober-bürgermeister.

Dr. Adickes of Frankfurt on the Main, one of the best known Germans, began his career in the Franco-Prussian war. He has since become a municipal administrator, serving as bürgermeister at Dortmund, Altona, and Frankfurt, and, like Kirschner and Tröndlin, has added inestimably to the efficiency of the municipal administration.³⁸

In closing I desire to commend to the reader the view of one M. Pyfferoen, who in his treatise on *Berlin and its Administrative Institutions*, remarks:

"The magistrat administers local affairs without restraint (librement) except where the law expressly places such matters within the com-

³⁷ For this and following records, see H. A. L. Degener, *Wer ist's?* (1905).

³⁸ See bottom of next page.

petence of the council. It is still more free when it acts as representative of the central authority, or when powers are delegated to it by the government, for here its mission absolutely escapes all supervision of the council. * * * Apart from the one or the other body, the one who really governs the city is the ober-bürgermeister, so called in distinction from his assistant or representative, who holds the title of bürgermeister. The police excepted, he holds in his hands the reins of the whole administration. He is the superior in the hierarchy, above all officers and employees in the city, either elective or non-elective, and exercises over them discipline, enforcing his authority by the penalties which he may inflict. He presides over the magistrat, he names those who are to report (rapporteurs) on questions to be discussed, and the members of the commissions. He may, in case of need, substitute himself for the magistrat and use his own authority on urgent matters. With sanction from higher authorities, he may quash the decisions of the council or magistrat on ground of incompetence, when they violate law or equity or when they are contrary to the welfare of the state or the interests of the locality.

"This officer, so powerful, is chosen by the city council, but it should

³⁸ City.	Name and professional degree.	Term years.	Salary marks.	Previous service and university training.
Berlin 2,033,900	Kirschner M.D.	12	30,000	Has served at Bromberg and Breslau; also as recorder and bürgermeister of Berlin. Universities of Breslau, Berlin and Heidelberg.
	Reiche Dr. jur.	12	18,000	Poor relief officer, and author. Universities of Königsberg and Leipzig.
Hamburg 800,582	Mönckeberg Dr. jur.	1		Lawyer and senator. Universities of Heidelberg and Göttingen.
Leipzig 501,200	Tröndlin Dr. jur.	life	25,000 and other perquisites	Lawyer; member of council and bürgermeister. Universities of Leipzig, Berlin and Heidelberg.
Breslau 470,000	Bender Ph.D.	12	25,000	In Franco-Prussian war; judge; town councillor and bürgermeister of Thorn (West Prussia); author. Universities of Jena and Königsberg.
Dresden 514,638	Beutler	life	20,000	Of distinguished ancestry; bürgermeister of Meersburg, also of Freiburg (Schlesien); city treasurer and poor relief officer. University of Leipzig.
Frankfurt a. M. 337,000	Adickes Dr. jur.	12	30,000 and perquisites	In Franco-Prussian war; bürgermeister of Dortmund, Altona; writes on law and politics. Universities of Göttingen, München, and Heidelberg.
Hanover 249,619	Tramm	life	17,000	Member of the Prussian Herrenhaus (house of lords).

be understood that the government reserves to itself the approval of the choice and this consent is by no means a vain formality.

"The second bürgermeister fulfils the functions of the ober-bürgermeister in case of disability of the latter. He enjoys the same rights and is held by the same obligations. In other respects he may be considered simply as a member of the magistrat; he assists in its services and has a voice in its deliberations."³⁹

From a governmental point of view, the German municipal policy occupies a place midway between two other systems, those of France and England. The English city is controlled by one elected council, to which the council itself adds members known as aldermen. Each important branch of city government has at its head a standing committee, which selects a permanent expert chief for the department. The mayor, who in no way differs from his colleagues, is elected by the council. He serves but a single year, his only important function being that of presiding officer and titular head of the corporation.⁴⁰ He has power to control neither executive nor legislative business. Apart from certain supervisory authority vested in the home secretary and the local government board, the voters control the council and the council the committees that carry on the city government.

In France we see the opposite extreme. The maire, elected by the council, assigns to his adjoints their several tasks and constantly supervises their action. His is the controlling spirit in the administration; for, whereas the council meets only four times a year, the executive corps holds frequent sessions. Moreover, the French maire occupies a dual position, not known in England and for the most part not in Germany. Not only is he the head of all communal life, but in his locality he represents the central power of the state. In this position he stands below the prefect and sub-prefect in the national administrative hierarchy, and sees that the general laws are executed within his commune. He is elected for a four-year term, serves without salary, and in case of negligence is liable to suspension by the prefect.

³⁹ Oscar Pyfferoen, *Berlin et ses institutions administratives*, 13.

⁴⁰ Albert Shaw, *Municipal Government in Continental Europe*, 315. See also Shaw's *Municipal Government in Great Britain*, 59, and W. R. Anson's *Law and Custom of the Constitution*, ii, 233.

The German *bürgermeister* has no such autocratic power as this French *maire*, backed as he is by the central government; nor can he be compared in any way with his much less forceful counterpart, the English mayor. Occupying a position between these two extremes, he has a part to play in German municipal life, a more important part than that of any other local official; he serves for many years, often for life; and, as official salaries go in Germany, he is well paid, and well deserves to be. He is a level-headed, well-trained, administrative expert, and often a man of national reputation.

In studying the German municipal system, one can not help asking whether it would bear transplanting over sea. In the United States, so far as I am aware, the board system has had a fair trial in but two cities, Washington, D. C., and Galveston, Texas; and in both places it has proved satisfactory.⁴¹ In spite of these two apparently successful attempts, however, it is far from probable that the German system would prove generally successful in America. For at least three centuries the lives of the German *bürger* and *bürgermeister* have reacted upon each other, and have developed civic conceptions entirely at variance with those prevalent in the New World. To choose a German magistrat by manhood suffrage would be to alter greatly its conservative character, which is, indeed, its greatest merit; and where in America may be found that class of administrative experts from which the *bürgermeisters* of the Old World are chosen? In other words, to transfer the institution from German soil and environment would be to alter its very nature, to change it beyond recognition.⁴²

⁴¹ A. R. Conkling, *City Government in the United States*, 22.

⁴² Yet the idea of municipal government by means of the board system is at present gaining ground in the United States. Agitation in Boston, Massachusetts, and in other eastern sections points in this direction, and recent legislation in Iowa seems to be an even stronger indication of the advance of the German system.

NOTES ON CURRENT LEGISLATION

MARGARET A. SCHAFFNER

Accidents. On February 25, 1908, a bill (H. R. 17979) relating to accidents on railways engaged in interstate and foreign commerce was introduced in congress.

The bill is a reënactment in substance of the law approved March 3, 1901, with new matter added which extends the scope of the reports on accidents at present required from common carriers, and also gives the interstate commerce commission authority to investigate for itself the causes of accidents resulting in serious injury to person or property. The commission is required to make public reports of such investigations, stating the cause of accident and the responsibility therefor, together with such recommendations as it deems proper. It is further provided that neither the reports of the company nor the investigations made by the commission are to be admitted as evidence or used for any purpose in any suit or action for damages.

Banking. The force of the panic of October, 1907, fell most heavily upon the banking institutions of New York State. Ten banks and trust companies, with twenty-one branches and a capital of \$4,000,000, closed their doors; only three of which were able to resume business. These institutions were all under the regulation of State laws and the supervision of the banking department of the State, hence the immediate attempt was made to determine the weak parts of the State banking laws with the view to remedial legislation at the session of 1908. Shortly after the panic, Governor Hughes asked a number of prominent New York bankers to form a committee to report their views on banking reform. Their conclusions were laid before the legislature. The superintendent of banks, whose duties during the panic brought him into close touch with the evils in banking conditions, also gave most valuable advice in his annual report. These reports together with the recommendations of the governor form a good working basis for scientific amendment of the banking laws. The reasons for bank failures in this State are summarized by the superintendent as follows: lack of proper supervisory power, too great interdependence between corporations, a

lack of association for mutual assistance, and corporate abuses. Corporate abuses took four forms according to the superintendent, namely, a general disregard of law; lack of conservatism in management; inattention to, and disregard of, the duties of directors; and improper use of corporate credit for personal advantage.

To remedy the defects in the laws which permit these evils, is the purpose of the legislation which is being enacted at Albany.

SUPERINTENDENT'S POWERS. The superintendent of banks is given power by the proposed legislation to direct the discontinuance of unsafe practices, and may either publish the facts or assume charge of the bank on the ground that it is in an unsafe condition. At present he can only call the attention of the bank to the unsafe practices and may not take charge unless it shall appear that it is unsafe for the corporation to continue business. Power is also granted to investigate a corporation asking banking privileges and to grant a certificate of authority in his discretion if the corporation appears to be sound and public convenience or advantage would be promoted thereby. This power which is exercised to a certain extent at the present time, is extended and made to apply also to branches of banks or trust companies. Likewise the power of the superintendent to take charge of banks or the business of individual bankers, which he deems unsafe, is specifically extended to cover all institutions under his supervision. He is also made the statutory receiver for all failed banking institutions. Branch banks are not to be established except on his authority and the addition of \$100,000 to the capital of the parent bank or trust company for each branch.

INTERDEPENDENCE OF CORPORATIONS. The report of the superintendent of banks attributes six of the ten bank failures to excessive interdependence of financial institutions, and moneyed corporations. The remedy proposed is a limitation upon the amount of loans which a banking institution may make to any other moneyed corporation. The limit of the amount of loans to a single interest is lowered from 40 per cent to 25 per cent, and limitations are placed upon underwritten loans to a single corporation. A time limit of one year is also placed upon underwritten loans. State banks are prohibited from loaning upon real estate mortgages more than 10 per cent to 25 per cent—varying according to locality—of their total assets. The use of second mortgages as security is prohibited.

CORPORATE ABUSES. The main corporate abuses which the proposed legislation seeks to remedy are the inattention to the business of the corporation on the part of directors or trustees, use of corporate funds for

personal advantage, and deposits of the funds of a corporation conditioned upon a loan to any officer of the corporation.

To meet these evils, regular meetings are required once a month and a copy of the transactions of the previous month must be given to each director and filed, together with the list of the directors present at the meeting, with the records of the corporation. The publicity thus furnished is expected to awaken a keener responsibility on the part of officers and to lessen the evils of "kitchen cabinet government." To meet the evils which have grown out of the practice of depositing funds with other corporations in which some of its officers are interested, it is provided that depositories must be selected by a majority vote of the directors exclusive of those who have an interest in the depository designated. Deposits made or pretended to be made with another corporation for the purpose of receiving a loan, by any officer are prohibited.

FUNCTIONS OF BANKING INSTITUTIONS. The failure of trust companies and banks during the panic, disclosed the dangers of permitting banking institutions to engage in business outside of their intended sphere without a corresponding responsibility. Trust companies do a regular bank of discount business, and banks of discount encroach upon the field of the savings bank. The intent of present legislation is to treat banking corporations according to the kind of business they do rather than the name under which they act. Proper reserves for each class of institutions, which are increased in each case, over present requirements are provided. Banks of discount in New York City must keep 25 per cent of the aggregate of deposits, trust companies 15 per cent. Outside of New York the reserve must be respectively 15 and 10 per cent.

A few minor bills are before the legislature, relating to various phases of the question, the disposition of which cannot be foretold. The main lines of banking reform above set forth are meeting with little substantial opposition. The whole reform would appear to be conceived in a spirit of fairness to all interests concerned, and is based upon careful analysis. When we recall that 20 per cent of the banking capital of the country is subject to the laws of New York, the need of careful and considerate treatment is apparent.

JOHN A. LAPP.

Highways. "Centralization of administration" is making a distinct advance in New York, at this session of the legislature, through the

proposed enactment of a revised highway code embodying provisions for the establishment of a State highway commission with extensive powers of direction and control over the construction and maintenance of highways. The proposed law repeals upwards of three hundred and forty laws besides making numerous amendments to the "town," "county" and "railroad" laws. The present highway law of New York is a chaos of conflicting provisions. Starting with the original "labor system" the highway code has been built up by engrafting new forms upon the old base without any attempt at codification. A permissive form of the "money system," to be decided by popular vote of townships after approval of the plan for the county by the board of supervisors, has come to prevail in over two-thirds of the State. Under this system the State bears part of the expense of maintenance. The proposed law extends the money system to the entire State. The State has also instituted a far reaching scheme for "good roads." The proposal to expend \$50,000,000 by the State for the purpose was approved by the people at the general election in 1905, and the work has been begun under the direction of the State engineer and surveyor. The proposed law systematizes the whole highway work of the State and plans it under the administrative supervision of a new State commission of highways. The bill is the work of a special joint committee appointed by the legislature in 1907 to investigate the subject and report a revised highway law. The committee held hearings throughout the State and their report and draft bill embody the best attainable advice and experience. It is modeled quite closely on the Massachusetts system in its central administrative features. The powers and duties now conferred upon the State engineer and surveyor in respect to highways are transferred to the new department of highways. At the head of this department is a commission of highways composed of three members appointed by the governor for a term of six years. Two deputy commissioners are provided for and the State is to be divided into not more than six divisions, over each of which is placed a division engineer. County superintendents where now existent are continued. Counties which have not provided for a county superintendent are to be grouped under a district superintendent. At the bottom of the scale is the town superintendent who takes the place of the present highway commissioner. The deputy commissioners, district superintendents, and division engineers are to be chosen and removed by the commission. County superintendents are to be chosen by the board of supervisors and may be removed by it or by the commission. Town superintendents are to be

chosen by the electors of the township, but by local option, the election may be made by the town board. They are made removable by the town board on charges, but an appeal lies for either side to the county court which is the final judge. The power of direction and control is given to the higher officers in the case of all roads constructed or maintained wholly or in part by the aid of State money. This power extends to practically all of the highways.

Three systems of roads, are to be maintained; first, a system of State roads, 3332 miles of main trunk lines throughout the State, constructed and maintained wholly by the State; second, county roads, which are to be constructed at the joint expense of the State and county when the board of supervisors shall so determine and the commission approve; third, the remainder which are left to be repaired by the town, under the "money system" with State aid apportioned to the assessed valuation of property per mile of road, the amount of aid ranging from one-half to one-third of the expenditure.

The real merit of the bill is in the expert control which will be furnished in the highly technical matter of construction and repair of highways. Present methods are haphazard and wasteful. The proposed law promises to provide an effective system of supervision. An attempt is made to remove the highway administration from politics by requiring that the commission be bi-partisan. One commissioner must be a member of the largest minority party. The separation of the highway work from the office of State engineer and surveyor was made after careful consideration. The joint committee believed that to entrust the work of constructing highways involving an expenditure of \$75,000,000 and upwards to the State engineer and surveyor in addition to the work of canal construction which involves the expenditure of \$100,000,000, was placing too much responsibility upon one officer. To avoid suspicion of partisan motives by the committee which is republican, against the State engineer and surveyor, who is a democrat, the law does not go into operation until the January, 1909, when the term of the present incumbent ends.

JOHN A. LAPP.

Industrial Disputes. A bill (H. B. 1152) entitled "A bill to aid in the prevention and settlement of strikes and lockouts in mines and industries connected with public utilities," has been introduced in the lower house of the Ohio assembly. The bill is almost an exact reproduction of the law passed by the Canadian parliament in March, 1907, with a few changes in phraseology to make it applicable to Ohio.

The present law on arbitration in Ohio provides for a permanent board, but no distinction is made between disputes arising in industries intimately connected with the public welfare and other disputes, and arbitration of the former class of disputes is not compulsory. The proposed law after defining carefully the terms used, especially "strikes" and "lockouts," gives the conditions of arbitration. Either party to a dispute arising in trades or industries to which the proposed law is to apply—the governor deciding this point—may make application to the governor for the appointment of a board of conciliation and investigation. The board is to consist of one member recommended by the employers, one by the employees, and a third recommended by these two. In case any of the parties fail to make the recommendation after a specified time the governor makes the appointment without such recommendation.

The board is given full powers of investigation; it may administer oaths, subpoena witnesses, enter any workshop or mine under consideration, or authorize anyone else to enter such workshop or mine for purposes of investigation. If it considers the dispute trivial, it may dismiss the case.

It is made unlawful for a lockout or strike to occur in any of the trades or industries coming under the law prior to or during reference to a board. An employer who violates this provision is liable to a fine of not less than \$100 or more than \$1000 for every day or part of a day during which the law is violated; an employee violating the provision is liable to a fine of not less than \$10 or more than \$50 for the same time. The parties need not be bound by the recommendations of the board, but if they do agree to be so bound, the recommendations shall be made a rule of the court and so enforced.

Other trades and industries may take advantage of this act by written application to the commissioner of labor, agreeing to be bound by the provisions of the act.

Other interesting provisions are that no counsel may appear except by consent of both parties, and the board may even then decline to allow counsel; and that no proceeding under the act is to be deemed invalid by reason of "any defect of form or any technical irregularity."

The bill provides for the repeal of the existing law on arbitration.

NELLIE F. SHEETS.

Old Age Annuities. A bill (No. 120) providing a plan for old age pensions or annuities was introduced in the Canadian parliament March

10, 1908. The bill declares that it is expedient to authorize the sale of government annuities in order to promote habits of thrift and to give opportunity to the people of Canada to provide for old age. It is proposed that annuities of not less than \$50 nor more than \$600 per year be purchased by the payment of a single sum or by the payment of a stipulated sum periodically at fixed and definite intervals. The governor in council is to fix the rate of interest to be allowed in the computation of values in tables which are to be the basis of such purchases. The annuities are to become payable when the annuitant shall have reached the age of fifty-five, or have become disabled. If the annuitant dies before the annuity becomes payable, the moneys paid in with 3 per cent interest compounded yearly are to be paid to the heirs.

The property and interest of an annuitant in the contract is not to be assignable and is to be free from legal process, unless the annuitant enters into and pays consideration for it with intent to defraud or deceive a creditor. If the creditor is able to prove such intent in a court of competent jurisdiction, he is to receive the amount paid in with 3 per cent simple interest, if the annuity has not become payable; and is to receive the present worth of the annuity if it has become payable.

The money paid in for annuities is to go into a consolidated revenue fund. Annuities due are to be paid from this fund. An account, known as the government annuities account, is to be kept of all moneys received and paid out in connection with annuity contracts, and of the assets and liabilities appertaining to the grant of annuities. The liabilities are to include the present value of the prospective annuities contracted for up to the end of the fiscal year.

LEONE SPOOR.

Primary Elections. Direct primary legislation has been receiving the attention of a large percentage of the legislatures in session during the winter of 1907-08. Out of a total of 18 sessions, 11 regular and 7 special, at least 7 or 8 have been concerned to some extent with such legislation, either new or amendatory.

After a prolonged and hard fought struggle the reluctant legislature of Illinois, compelled by public sentiment, passed its third primary election law, a measure much more comprehensive and progressive than either of the other two declared unconstitutional by the State supreme court.¹ The Kansas legislature called in special session on January 16,

¹ See AMERICAN POLITICAL SCIENCE REVIEW, February, 1908, pp. 271-72.

1908, primarily to provide for direct nominations, speedily enacted a direct primary law and made it effective on publication February 6, so as to govern nominations for the important general election this year. In Ohio the governor's message reiterated the repeated recommendations of his last three predecessors in favor of the enactment of a primary election law, and two bills have passed the legislature, one in each house, so nearly identical in their essential provisions, and with so few and minor differences, that the passage of a compulsory direct primary law at this session would seem practically assured.

In his annual message the governor of New York recommended that the legislature make provision for "direct nominations at the primary of candidates for office," the provision to be "permissive," or optional in form. This plan and others are embodied in different bills now under consideration in the legislature. The Oklahoma constitution declares that, "The legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for State, district, county and municipal officers, for all political parties, including United States senators." This duty is being considered and will doubtless be discharged by the legislature now in session. To the legislature of West Virginia, in extra session, the governor in his message cites, "a primary election law" as one of several subjects in "need of good and wise legislation." Lastly, more advanced direct primary legislation is being urged upon the legislature of Massachusetts.

The new laws of Illinois and Kansas present many fundamental likenesses, and also some marked differences. Both laws are compulsory and State wide, abolishing the old convention system, and transforming the political party from a voluntary, extra-legal association into a public one, whose essential organization and government are defined by law and subjected to legal control. The Illinois law provides for the direct nomination of all candidates of all parties for all offices except United States senator, presidential elector, trustee of the State University, and those filled at township and school elections; the Kansas law for all except presidential elector, school district officers and offices in cities of less than 5000 population. Judicial offices are not excepted as in some of the other States. Both laws provide that the primaries of all parties be held on the same day at the same time and place and before the same election board. In both States the expense is wholly a public charge, the same as at general elections. Neither law requires the candidate to pay a fee to get his name on the ballot. Both require nomi-

nation petitions signed by a specified number or percentage of party voters. The Illinois law requires not less than 1000, nor more than 2000 signatures for a State office, not less than 3000, nor more than 5000 for United States senator, and one-half of 1 per cent of the party voters in any political subdivision by which the official is elected. No provision is made to secure distribution of signers over the State or political subdivisions. The Kansas law requires the signatures of a given percentage of the party vote in the political division electing the official: for a State office or for United States senator, not less than 1, nor more than 10 per cent; for a district office, not less than 2, nor more than 10 per cent; for a subdistrict or county office, not less than 3, nor more than 10 per cent. In every case provision is made for a fairly wide distribution of the signers.

Both laws provide for the closed primary, with separate party ballots of different color in Illinois, but not in Kansas. The party test is the more stringent in Illinois for the voter must declare his party affiliations before receiving a ballot, and, if challenged, must take oath that he has "not voted at a primary of another political party within a period of two years." The Kansas test is more liberal and looks to the present and future rather than the past. The voter is to "announce the name of the political party for which he desires to vote," whereupon he is to receive said party ticket, unless challenged, in which case he must take oath that he is then "a member of and * * * affiliated with the * * * party."

Both acts provide for plurality nominations with no safeguards against nominations by small minorities. The same is true of the two bills passed by the Ohio senate and assembly. Thus the tendency seems to be strongly toward acquiescence in plurality nominations as well as elections.

These laws both provide for a direct vote on candidates for United States senator. In Illinois the vote is to be "for the sole purpose of ascertaining the sentiment of the voters of the respective parties," or merely advisory. In Kansas, however, the candidate "receiving the highest number of votes of his party in the greatest number of representative and senatorial districts of the State shall be declared * * * the nominee of such political party for United States senator," with the view of binding, politically, if not legally, the party members of the legislature. The provision requiring the successful candidate to have a plurality of the party vote in a plurality of the legislative districts, is unique in direct primary legislation and rather undemocratic. The

reason for this provision is that the constitution of Kansas guarantees to every county with 250 legal voters, one member in the house of representatives, with the result that several western counties have a voice in the legislature wholly out of proportion to their population. Hence to preclude all doubt as to its constitutionality, this same anomaly was written into the primary law.

Both laws prescribe a practically complete system of party organization. In Kansas this organization consists of a set of committees and a "State party council." Each county precinct elects biennially and each city precinct, annually, by direct vote of the party electors, a precinct committeeman. The precinct committeemen of a county or city respectively constitute its central committee. When a district comprises but one county or less, the county committee is also the district committee; but, if it comprise more than one county its committee is composed of the chairmen of the different county committees and additional members chosen by the committee of each county on the basis of the party vote therein. The State committee is composed of the chairmen of the various county committees, and its executive committee is to consist of the chairmen of the various congressional district committees.

The "State party council" for each party is to be composed of the party nominees for State offices, United States senator, congressmen, and members of the legislature; also the national committeemen, the United States senators, the State senators whose terms expire beyond the succeeding January, and the chairmen of the several county committees. This council is to formulate the party platform, and serve for two years with "power to call special meetings and perform such other business as may be consistent with the provisions of this act."

The provisions of the Illinois law are, if anything, even more elaborate and part of the organization more democratic than under the Kansas act. The permanent party organization is to consist of committees as follows: (1) a precinct committeeman chosen directly by the party voters of the precinct; (2) county and city central committees composed of their respective precinct committeemen; (3) senatorial committees composed of members elected directly by the party voters of the counties forming the district; (4) congressional committees composed of the chairmen of the county committees, if the district comprise two or more counties; of the precinct committeemen, if formed by one county or a part of one or more counties; (5) a State committee composed of one member from each congressional district to be elected by direct vote of its party electors.

These committees are to be chosen every two years. They are to "have the powers usually exercised by such committees" not inconsistent with the law, but are forbidden "to delegate any of their powers or functions to any other person, officer, or committee."

The law further provides for a series of "conventions," county, senatorial, congressional, and State. The county central committee is to constitute the county convention and choose delegates to each and all the others. No duties are prescribed for the senatorial convention. The congressional conventions are to select delegates and alternates to the national convention; and to recommend to the State convention the nomination of a candidate or candidates for presidential elector. The State convention is to nominate candidates for presidential electors and for trustees of the State University, "to adopt any party platform," and to select delegates and alternates to the national convention. "Each convention may perform all other functions inherent to such political organization and not inconsistent with this act." Nothing is said regarding the size of the conventions, other than the county, nor of representation therein; these matters being left entirely to the discretion of the county conventions and the various party committees.

LEON E. AYLESWORTH.

Public Utilities. Proposed amendments to the public service commission law of New York would place telegraph and telephone companies under the supervision of the commissions. The law as passed in 1907 (c. 429), applies to railroads, street railroads, express, freight, car, car line, and freight line companies and to gas and electrical companies furnishing gas or electricity for light, heat or power.

That part of the law relating to common carriers, is extended by the proposed amendments to include telegraph and telephone companies. Specifically, these companies would be required "to provide adequate, just, and reasonable service," at just and reasonable rates. Unfair prejudice or undue preference between persons and places is prohibited. The lines and appliances of such companies must be so placed as not to interfere with the public convenience. The commission may order repairs, improvements, changes, additions, or alterations, which are shown after a hearing to be necessary to promote the security or convenience of the public or employees or to secure adequate service, and the companies must comply within a reasonable time.

No provision was made in the law of 1907, specifically restricting regulation of carriers which do an interstate business to that part of their

business which is wholly within the State. The commissions could not of course exercise greater powers, but to avoid any possible construction which would seem to bring the law into conflict with the interstate commerce law, the proposed law limits the application of the law relating to carriers, telegraph and telephone companies to intrastate transportation of persons, property, or messages.

JOHN A. LAPP.

Race Track Gambling. The prohibition of race track gambling in conformity with the constitution which declares that poolselling and bookmaking shall not be authorized nor allowed, is one of the issues prominently before the legislature of New York at the present session. Bills to prohibit these practices have been before several preceding legislatures but have failed usually to get beyond the committee stage. This year the issue is given special prominence by the recommendation of Governor Hughes in his message of January 1, 1908, in which the issue was put strongly and squarely up to the legislature, and by the personal advocacy of the reform by the governor. The measures introduced to carry out his recommendations have come to be looked upon as the governor's measures.

The history of race track gambling legislation in New York presents an example of "special privilege" in a most iniquitous form. The laws now on the statute book have fairly earned the title "constitution smashers" for within the strict letter of the constitution they permit and even promote the very practices which the constitution prohibits, and they do it so skillfully that they have stood the test of the courts and have been declared to be within the letter of the constitution, although plainly contrary to the spirit of that instrument. Poolselling and bookmaking were prohibited in 1877 and the prohibition continued until 1887, when by a narrow margin, the legislature passed the Ives pool law which legalized these practices on the tracks of authorized racing associations between the fifteenth of May and the fifteenth of October of each year, for not more than thirty days on one track. At other times and places poolselling and bookmaking were declared to be a felony. A tax of 5 per cent of the gate receipts (later changed to "gross receipts") was levied upon racing associations taking advantage of the act, and the funds thus secured were appropriated to the county fairs to be used for prizes in improving the breed of stock.

The excesses of gambling under this act resulted in an awakening of the public conscience, and the constitutional convention of 1894, by a vote of 109 to 4, declared that poolselling and bookmaking should not

be authorized nor allowed, and the legislature should pass appropriate laws to carry out the intent of the constitution. The duty of enacting appropriate legislation fell first to the legislature of 1895. The simplest way would have been to repeal the Ives pool law of 1887, which was in fact abrogated by the constitution so far as poolselling and bookmaking were concerned, then the provisions of the penal code would apply alike to all poolselling and bookmaking in the State. The legislature, however, had other designs. They determined to continue the old conditions under the guise of conformity with the constitution. Two laws which are remarkable for their clever evasion of the constitutional prohibition were passed late in the session (Laws, 1895, c. 570 and c. 572.) They first established a State racing commission; regulated the formation of racing associations; required the posting of notices and the employment of police for the prevention of gambling; prohibited racing associations from accepting any compensation for gambling privileges; and levied a tax of 5 per cent upon the gross receipts of racing associations. After providing that the racing associations should make a pretense of preventing poolselling and bookmaking, the law declares that anyone violating the provisions should be liable in a civil action for the amount bet or recorded, and this penalty was declared to be exclusive of any other penalty provided by law. The second law penalized poolselling and bookmaking by fine and imprisonment, but exempted all cases where another penalty is provided. Another penalty, namely civil liability for the amount bet or recorded, is provided by law for offenses of this kind committed on a race track, hence this law applies only to offenses committed outside of race tracks. By the laws as passed in 1895, racing associations were expressly prohibited from exacting or accepting any compensation for gambling privileges. This provision was not satisfactory to the associations and some of them complained in a letter to the State racing commission that their business did not prosper. They said that the tax of 5 per cent had previously been levied as a fine for gambling privileges which were now withheld, and to provide a possible source of revenue to offset these losses, they suggested that the associations be permitted to charge different prices to different parts of the grounds where there would be special privileges such as the grandstand, reserved seats, paddock, etc. This privilege had been denied them they said, by the State racing commission on the ground that it might be construed as the accepting or exacting compensation for gambling privileges. How such an absurd construction could be placed on the law was not satisfactorily explained.

The legislature, apparently without understanding the nature of the concession, granted the right to charge different prices to different parts of the grounds, and the legislature of 1897 confirmed the concession "unless such poolselling or bookmaking as is punishable by fine and imprisonment or other act so punishable, be thereon authorized or knowingly permitted." It was observed above that poolselling and bookmaking on a race track are not "punishable by fine or imprisonment," but by civil liability for the amount bet or recorded. The provision amounted to a concession to maintain poolselling sections and to charge admission to them. This was recognized by the court of appeals in the case of the *People v. Stedeker*, 175 N. Y., 57, where the court said that the associations are given the right "to charge an additional entrance for admission to a special portion of the grounds, set aside for occupation by or for poolsellors and bookmakers." By the same act the provision of the law of 1895 which prohibited the acceptance of compensation for gambling privileges was abrogated.

The result of these three years of legislative manipulation was, that practically all restraint was removed from poolselling and bookmaking, on the tracks of racing associations, and the constitutional prohibition was nullified in its application to race tracks.

The constitutionality of the law of 1895 was before the court of appeals in 1897 in the case of the *People ex rel Sturgis v. Fallon*, 152 N. Y., 1. The law was upheld on the ground that the legislature had the right to determine what was an appropriate law to carry out the provisions of the constitution and with the discretion of the legislature, the court could not deal. The legislature exercised its discretion in placing a lesser penalty upon the offenses when committed on a race track and the court declared that they could not condemn the law as invalid simply because in their opinion "some more effective or more appropriate law might have been enacted."

The remedy must, therefore, be a legislative remedy. Experience has shown that the laws on the statute books do not carry out the intent of the constitution. The evils exist and in fact are increased through the present laws. The gross discrimination between gamblers which makes the one outside the race track a felon, while the one inside goes free, complicates, if it does not practically nullify enforcement.

The bills before the legislature, the so-called "Agnew-Hart bills," make poolselling and bookmaking, misdemeanors and provide a penalty for the offenses wherever committed.

The reform is opposed by the powerful interests connected with the

Jockey Club, an association which practically controls the conduct of racing, and by the breeders of fast horses and allied interests. It is supported by all friends of moral reforms and by public sentiment generally. The farmers of the State are divided in their support. The State grange, representing upwards of 70,000 farmers, passed resolutions at their meeting in February, strongly favoring the reform. On the other hand the county fair associations are actively opposing it, the ground of their opposition being the loss of the pool tax which had been distributed to them in the past for prizes to improve the breed of stock. This objection loses its point, however, through the proposal, which is strongly supported, to appropriate an equal sum directly to the county fair associations. The great mass of the farmers are doubtless in favor of the reform. There is an attempt, however, to confuse the issue in their minds by maintaining that there is a necessary connection between race track gambling and the "improvement of the breed of horses."

JOHN A. LAPP.

Rural Delivery Parcels Post. A bill (S. 5122), to provide a rural delivery parcels post for merchandise and other articles mailed on rural delivery routes was introduced in congress on February 10, 1908.

Special rates of postage are provided as follows: five cents for the first pound and two cents for each additional pound or fractional part thereof; and on parcels weighing less than a pound: for two ounces or less, one cent; over two and not exceeding four ounces, two cents; over four and not exceeding eight ounces, three cents; over eight and not exceeding twelve ounces, four cents; and over twelve ounces and not exceeding one pound, five cents. Parcels covered by the special rural postage rates are not to exceed eleven pounds in weight, three feet six inches in length, or six feet in length and girth combined.

The rural rates do not apply to parcels offered by any person acting as agent or representative, for any person or company not resident on the rural delivery route but apply only to such parcels as are offered by resident merchants or dealers and by residents in their individual capacity.

Taxation—Centralization in the Taxation of Personal Property. A bill entitled, "An act to provide for the assessment of personal property by the commonwealth," has been introduced in the Massachusetts legislature. This bill (house no. 950), is worthy of note for two reasons: first, it is an attempt to tax all personal property and tax it at a

uniform rate throughout the State, and second, it shows the tendency at the present time toward centralizing the supervision, direction, and control of assessments in the hands of State officials and State tax commissioners. This movement seems to be keeping pace with the movement toward the separation of the sources of State and local revenue. The equal and uniform assessment of personal property has always been a difficult problem and one that is still far from solution. In many States the tax payer is required to take oath that the list and values given by him are true and accurate. Other States like Iowa and Ohio have doubted the oath of the tax payer to such an extent that they have given agents a certain commission to ferret out and list all property that has escaped taxation. One State, Pennsylvania, has fixed a low rate on personal property, believing that with such an inducement, the tax payer would be willing to list all of his taxable property at its true and full value. In Wisconsin, where the county officers are elected, there is an official called the county supervisor of assessments, who is chosen to supervise all assessments made by the local assessors. These county supervisors are under the supervision and control of the State tax commission. The Massachusetts bill would go even beyond this and place the entire assessment and taxation of personal property in the hands of the State tax commissioner. He is to have power to appoint, subject to the approval of the governor and council, twenty supervisors of taxes. Each supervisor is to have control of a tax district composed of two adjoining senatorial districts. In addition to this, the commissioner is to appoint one State assessor for each city and town in the State, but the State assessors are subject to removal at any time by the commissioner on filing a statement of reasons with the secretary of the commonwealth. The supervisors and State assessors must be residents of the State, but need not be residents of their respective districts, cities, or towns. Both officials are to be paid from the State treasury, the supervisors to receive \$2500 and necessary expenses, and the State assessors, who are to be ex-officio chairmen and members of the board of assessors of the city or town for which they are appointed, are to receive 20 per cent more than the other members of the city or town board, and in no case less than \$3.50 per day for actual service.

All personal property, including incomes, subject to local assessment in any city or town under the law as it now stands is to be assessed by the State assessor, and the rate on this class of property is to be uniform throughout the State, and equal to the rate laid by the tax commissioner on business corporations in the year last preceding. The State assessor also aids in making the real estate assessment.

Two-thirds of this proposed tax on personal property is to be paid to the treasurer of the commonwealth, and the remaining one-third is to be retained for the use of the town. Out of the proportion going to the State, are to be deducted the expenses of assessing and collecting, even to the ratable share of the expenses of the tax commissioner's department. In addition to this, the State is also to retain such an amount as the legislature deems necessary for State purposes in lieu of a State tax. The remainder is to be distributed to the various cities and towns, one-half in proportion to their respective real estate valuations, and one-half in proportion to their respective population as defined by the last preceding State or federal census.

Such are the provisions of the proposed law. It is an attempted solution of the present day difficulty of taxing personal property by assessors locally elected, a good example of extreme centralization, carried to its logical conclusion with assessors appointed by the tax commissioner and paid by the State.

ROBERT ARGYLL CAMPBELL.

Taxation—Pending Constitutional Revisions and Amendments¹. Several of the States have passed measures looking toward a change in their constitutions concerning the subject of revenue and taxation. Some would accomplish this end by a general revision of the constitution, others by changes in the organic law as it now stands. Considered from the point of revenue and taxation alone, an amendment often times means more than a revision, for a constitution may be revised and adopted by the people and the clauses relating to taxation simply carried over from the old to the new, while it often happens that a single amendment changes the whole system of taxation, and materially affects no other part of the constitution.

No important constitutional revisions are before the people at the present time. Connecticut has just voted down an amendment to the constitution in the form of a revision, but in the proposed constitution no attempt was made to change the simple clause stating that the property of no person is to be taken for public use without just compensation, which has formed a part of the Declaration of Rights of Connecticut since 1818 (art. 1, sec. 2). The question of calling a constitutional convention in Maryland was submitted to a vote of the people last November, but was not approved. The present constitution of Michi-

¹ These amendments will all be voted on in 1908.

gan states that in 1866 and every sixteen years thereafter the question of a general revision of the constitution is to be submitted to the electors of the State. This does not mean that the constitution cannot be revised at any other time. The people had the privilege of voting for or against the proposed revision in 1898, but did not deem that the constitution needed revision at that time. During the last session of the legislature, however, provision was made for holding a constitutional convention and the delegates have since been elected and are at present diligently considering the provisions which are to form the new proposed constitution. Numerous sections relating to taxation appear among the proposed provisions, but nothing definite can be stated concerning their adoption at the present time.

When we turn from proposed revisions and revisions now being made, to the question of amendments, we find a much more fertile and clearly defined field. Each proposed amendment shows a real desire for a change in the tax system, aims to remedy defects and make the constitution more in harmony with present day beliefs and demands.

The important amendments proposed and now before the people are found in the newer States, and with one exception, Wisconsin, in the States west of the Mississippi. This fact seems due to three causes; first, the tax systems of certain of the western States are not so fully developed, so well crystallized and so bound up in court decisions as the systems of many of the eastern States; second, there is a more radical element in the west not afraid to attempt new things; and third, the States of the west are aiming to accomplish by constitutional provisions what some of the eastern States have accomplished by statutory law.

A more minute and detailed study will show the movement and tendency at the present time. Resolutions have been introduced in the California legislature providing for the repeal of the remnant of the mortgage tax law, for the separation of the sources of State and local revenue, for certain modifications in the duties of the board of equalization, and for a tax on quasi-public and certain other corporations. Missouri also has an amendment pending, considering the separation of the sources of State and local revenue, and providing for the establishment of local option for counties and municipalities. In Missouri, in addition to this, there are two minor amendments relating to taxes for road and bridge purposes. If the amendment offered in South Dakota is approved by the people, it will mean that the State will have an entirely new set of constitutional clauses relating to taxation, which are much more general than the existing law. The resolution intro-

duced in Washington would repeal four sections of specific clauses and substitute one section composed of general provisions, in their places. In Minnesota three amendments are before the people for consideration, one relates to the exemption of church property from taxation, another to the levy of a tax for road and bridge purposes, and a third to the levy of a tax to pay damages to growing crops from hail and wind. The amendment proposed in Montana deals with the rate of taxation for State purposes, and the one in Utah to the rate of taxation for general State purposes, for district school and for high school purposes. Texas and Wisconsin each have amendments concerning a tax for roads and bridges, and, in addition, Texas has an amendment providing for the maintenance and support of the public free schools of the State, and Wisconsin for the levy of a tax on incomes, privileges and occupations.

Two constitutional amendments relating to revenue and taxation are pending in California at the present time. One deals with the repeal of section 4 of article 13, relating to the taxation of mortgages. Section 5, which states that every contract by which a debtor is obligated to pay any tax on money loaned or on any mortgage, is to be null and void with regard to the interest, and the tax or assessment was repealed by a vote of the people in November, 1906. Section 4 still remains and states that mortgages are to be taxed as an interest in the real estate and that each party to the mortgage is to pay taxes on his respective interest, or, if the owner of the security pays the tax on the entire property, the part that should have been paid by the mortgagor is added to the debt and if the mortgagor pays the taxes on the interest of the mortgagee, it is to be considered as a payment on the debt secured. California was the originator of this plan, and, although it was adopted by other States, California is the only one to retain it for any length of time. A law passed in 1907 (c. 368, sec. 1) permits contracting acts, but even before that time court decisions had practically annulled the law and made it similar to the plan adopted in Massachusetts, Wisconsin, and several other States where the debtor and creditor may enter into a contract concerning the payment of the taxes. If this proposed amendment repealing section 4 is favorably considered by the people it will mean the end of the California system as provided by the constitution.

The other amendment pending in California relates to the question of the separation of the sources of State and local revenue and to the taxation of public service and other corporations for the benefit of the State. The general provisions relating to the separation of the sources of State and local revenue is not new. The present Virginia constitution,

adopted in 1902, contains a provision which reads as follows: "Nothing in this constitution shall prevent the general assembly after the first day of January, 1913, from segregating for the purposes of taxation, the several kinds or classes of property so as to specify and determine upon what subjects, State taxes, and upon what subjects, local taxes may be levied" (Art. 13, sec. 169). The recent constitution adopted in Oklahoma has a similar provision which provides that the State may select the subjects of taxation, and levy and collect its revenues, independent of the counties, cities, or other municipal subdivisions.

The proposed amendment in California is much more specific. It states just what taxes are to be levied for State purposes, just what taxes are to be levied for local purposes, and specifies the exact rate on certain classes and objects. The State revenue is to be obtained from corporations and public utilities, and all other property is to be assessed in the locality where it is situated, in the manner prescribed by law. All railroads, including street railways, whether operated in one or more counties; sleeping car, dining car, drawing-room car, and palace car companies; refrigerator, oil, stock, fruit, and other car loaning and other car companies operating upon railroads in the State; companies doing express business on any railroad, steamboat, vessel or stage line in the State; telegraph and telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies, banks, banking associations, savings and loan societies, trust companies; and all franchises of every kind and nature are to be taxed entirely and exclusively for State purposes. All other property, unless otherwise exempt from taxation, is to be taxed for local purposes, that is for county, city, town, township, and district purposes. The corporations and public utilities here enumerated are to pay annually to the State a tax upon their franchises, roadbeds, roadways, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property used in the operation of their business in the State. The tax is to be a fixed constant percentage upon the gross receipts and is to be in lieu of all other taxes and licenses, State, county, and municipal, but such corporation or utility is not to be released from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by the municipality. When such companies are operated partly within and partly without the State, the gross receipts within the State are deemed to include all receipts on business beginning and ending within the State and a proportion, based upon the proportion of the mileage within the State to the entire mileage over which such business

is done, of all receipts on all business passing through, into or out of the State.

The percentage on gross receipts is to be as follows: On all railroad companies, including street railways, 4 per cent; on all sleeping car, dining car, drawing-room car, palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies, 3 per cent; on all companies doing express business on any railroad, steamboat, vessel or stage line, 2 per cent; on all telegraph and telephone companies, $3\frac{1}{2}$ per cent; on all companies engaged in the transmission or sale of gas or electricity, 4 per cent. Insurance companies are to pay an annual tax of $1\frac{1}{2}$ per cent upon the amount of the gross premiums received upon business done in the State, less return premiums and reinsurance in companies authorized to do business within the same territory, and in addition to this, the proviso is added that any county and municipal taxes paid by the companies on real estate owned by them within the State, is to be deducted from the one and one one-half per cent tax on gross premiums.

The shares of the capital stock of all incorporated banks in the State are to be assessed and taxed by the State board of equalization to the owners or holders in the city or town where the bank is located. The shares of capital stock are subject to an annual tax of 1 per cent on their value. In determining the value of each share of stock, the amount paid in is first considered, and to this is added the shares pro rata of the accumulated surplus and undivided profits. The total value of the capital stock of the bank is found by deducting the value of any real estate other than mortgage interests owned by the bank and taxed for county purposes. The bank itself is required to pay this tax to the State on behalf of the stockholders. The moneyed capital, reserve, surplus, undivided profits, and all other property belonging to unincorporated banks or bankers is to be taxed at the same rate as the shares of stock of incorporated banks. The value of the holdings are to be determined by taking the entire property invested in the business, together with all of the reserve, surplus, and undivided profits, including the good will of the business at their full cash value, and deducting from this the value of any real estate, other than mortgage interests owned by the bank, and taxed for county purposes. It is definitely stated that it is the intention of the proposed law that the moneyed capital and property of unincorporated banks is to be assessed and taxed at the same rate as that of incorporated banks. The word "banks" is defined to include banking associations, savings and loan societies, and trust companies.

All other corporations, excepting those mentioned above, and educational, religious, and charitable corporations, and corporations which are not organized for pecuniary profits, are to pay an annual tax to the State upon their franchises, or if foreign corporations, then upon their right to do business within the State. The amount of the tax depends upon the amount of authorized capital, and is as follows: Up to \$10,000, \$10; \$10,000 to \$20,000, \$15; \$20,000 to \$50,000, \$20; \$50,000 to \$100,000, \$25; \$100,000 to \$250,000, \$50; \$250,000 to \$500,000, \$75; \$500,000 to \$2,000,000, \$100; \$2,000,000 to \$5,000,000, \$200; \$5,000,000 and over, \$250.

All franchises other than those expressly provided for, are to be assessed by the State board of equalization at their actual value and required to pay an annual tax at the rate of 1 per cent, for State purposes. The taxes are levied and assessed in March, payable in June, and computed on the gross earnings and gross premiums of the previous year. All the provisions are made self-executing, but the legislature may make all laws necessary to carry them into effect. No suit, action, or proceeding, is ever to be maintained in any court against the State or any of its officers to have any tax levied under the provisions of this proposed amendment declared invalid, or to prevent the collection of such taxes until the tax has been actually paid. It is only after the payment of the tax that action may be maintained to recover it, if illegally collected.

This proposed amendment has necessitated certain other changes in the provisions relating to revenue and taxation. Very little change is made in the organization of the board of review, but their duties have been somewhat modified. Section 10 of article 13, provided that railroads operating in more than one county were to be assessed by the State board of equalization and their assessed value apportioned to the various subdivisions and districts in proportion to the number of miles of track in each subdivision or district. If the proposed amendment passes, there will be no apportionment of taxes among the local subdivisions, for the entire revenue derived from railroads is to be for State purposes.

Under the present constitution, income taxes may be assessed to and collected from persons, corporations, joint stock associations or companies. The proposed amendment permits the use of the income tax, but a very important exception is made, and that is that corporations which are required to pay the gross receipt tax to the State are to be exempt from the income tax.

Such is a statement, in some detail, of the proposed amendment in

California. It is to be regretted that it was found necessary to attempt to make such a law, so minute in all its details and so like statutory law in all its provisions, a part of the constitution. If it is passed it will be allowed to harden and crystallize into constitutional law, which cannot be easily changed. California can never have any form of corporation taxes other than the gross receipt tax without a constitutional amendment; even the rate as applied to the separate utilities cannot be changed without a vote of the people.

In Missouri an amendment has also been proposed providing for the separation of the sources of State and local revenue. It is much more general than the amendment offered in California, and leaves more to the discretion of the legislature. If the Missouri amendment passes, it will become the duty of the general assembly to separate the sources of State and local revenue and establish local option for the counties and municipalities of the State in the selection of the subjects of taxation. The actual separation of the sources of State and local revenue and the establishment of local option and home rule is to be effected by the discontinuance of the levy of the general property tax upon the real and personal property of the State, from the first of January, 1909. After that date, the revenue required for all State purposes is to be secured from other sources than the general property tax, upon the real and personal property of the State or by an apportionment by the State board of equalization to the counties of the State and the city of St. Louis, of an amount sufficient, when added to the revenue which the State derives from other sources, to furnish all the funds required for State purposes. The general assembly does not give up its authority to levy upon the special subjects of taxation, other than the real and personal property, and when the general assembly does select any special subject for State taxation, it may exempt it from any form of local taxation and may appropriate the proceeds of the tax for State purposes, or apportion it back to the counties of the State and city of St. Louis. The counties and cities of the State may subject to taxation for local purposes the real and personal property within their jurisdiction and may exempt any class of property from taxation, either wholly or by reduction of rate, with the one provision that any tax or exemption from taxation made within any county or city is to be uniform upon the same class of subjects within the given territory. The counties or cities may also levy any form of license tax as provided for by existing laws or charters, if the general assembly has not seen fit to appropriate that source of revenue for State purposes. The taxing power in

counties not under township organization is to be exercised by the county courts; in counties under township organization, by the township board of directors; and in cities, by the municipal assembly, subject to the limitations of their charters.

It will be seen that this gives the general assembly considerable discretionary power. It may tax any form of property for State purposes, except real and personal property, and may even redistribute through the board of equalization, funds to the counties, which the State has derived from other sources. The only power given to the county is the power to tax real and personal property under the general property tax, for if the State wishes, it may even take away the license tax from the local units. On the other hand, if the general assembly sees fit, it may give the localities very great power and permit them to tax nearly every form of property and allow the State to derive its revenue from the counties as apportioned by the State board of equalization. In all probability a midway course will be pursued and the State will derive its revenue from taxes on corporations and public utilities, and leave the localities power to tax certain forms of business and real and personal property under the general property tax.

In Missouri, two other amendments relating to taxation are to be voted on at the same time. One provides that a tax of ten cents on the hundred dollars assessed valuation is to be levied, collected, set apart, and appropriated, in the several counties of the State as a permanent fund for public roads and highways; the other provides that the county courts in counties not under township organization and the township board in counties under township organization may levy a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used exclusively for road and bridge purposes.

The present Constitution of South Dakota contains limitations on the rate of taxation for State purposes, and the rate that may be levied for paying the public debt, prevents the classification of property, compels the taxation of moneys and credits, and provides that all taxes shall be uniform on all real and personal property according to the value in money. The amendment as proposed removes these special restrictions and substitutes general provisions in their places. No limitation is placed on the rate of taxation; the proposed provision simply states that the legislature is to provide for raising sufficient revenue to defray the ordinary expenses of the State by an annual tax, and that the public debt is to be paid off by an annual tax sufficient to pay the interest and principal of the debt within ten years. The new provision would also

permit classification; it simply requires that all taxes shall be uniform on the same class of subjects, and levied and collected for public purposes. This would not permit the exemption of moneys and credits, but it would allow their taxation at a lower rate. In addition to this, if the amendment is adopted, the legislature will be compelled to classify incomes as well as inheritances in respect to receipts and provide for a graduated or progressive tax, with such exemptions as it may deem advisable.

In Washington a somewhat similar step has been taken. Provision has been made for the repeal of the first four sections of article 7. These sections provide that all property in the State not exempt under the law of the United States or the State constitution, is to be taxed in proportion to its value; that all property is to be taxed at a uniform and equal rate; that the property of corporations is to be assessed and taxed as nearly as may be by the same methods as the property of individuals; and that the power to tax corporations is not to be surrendered or suspended by any contract or grant to which the State is a party. In place of these sections the simple general provisions are inserted, "The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes." To this is added a statement of property that is to be exempt from taxation, including the property of the United States, of the State, counties, school districts, and other municipal corporations, and personal property to the amount of \$300 for each head of a family. No attempt has been made to change the remaining sections of the constitution composed of general provisions and restrictions on the legislature.

Minnesota has three minor amendments. The amendment adopted in 1906 exempted all churches and church property. The proposed amendment states that church property in order to be exempt must be used for religious purposes. Minnesota has already made provisions for a road and bridge fund. This law is to be amended so that this sum is to include all moneys accruing from the income derived from investments in the internal improvement land fund, and also any amounts accruing to any State road and bridge fund and the legislature is also authorized to add to this by an annual tax on the property of the State. The third amendment as proposed states that the legislature may provide for the payment by the State of Minnesota for damage to growing crops by hail and wind, and create a fund for that purpose; may impose a tax on lands, the owners of which, at their option,

have listed it with county auditors for that purpose. No payment is to be made except from funds provided in this manner. This will permit the introduction of a plan of State insurance against hail and wind, but it will be entirely optional with the individual property owners whether or not they wish to be taxed for this purpose. In Montana an amendment is offered limiting the rate of taxation of real and personal property for State purposes. If the amendment passes, the rate will be limited to three mills on each dollar of valuation for a time, but when the taxable property in the State amounts to five hundred million, the rate is to be limited to two and one-half mills, and as soon as it reaches eight hundred million, the rate is to be limited to two mills. Utah has a similar amendment relating to taxation for State purposes, which holds that the rate is never to exceed eight mills on the dollar, until the taxable property within the State amounts to four hundred million dollars, and, then the rate is never to exceed five mills, unless the proposition to increase the rate has first been submitted to the qualified electors who have paid a property tax the year previous. Utah has one other minor amendment under consideration. The constitution as it now stands states that mines, mining claims, and their net annual proceeds are to be taxed as provided by law. The proposed amendment would simply substitute the words "by the State board of equalization" in place of "as provided by law."

In Texas, two amendments have been proposed. One relates to a tax for schools, the other to a tax for road and bridge purposes. One-fourth of the revenue derived from the State's occupation taxes and the poll tax of one dollar on male inhabitants, is to be set apart for the benefit of the public free schools, and, in addition to this, there is to be an annual ad valorem State tax, not to exceed twenty cents on the one hundred dollars valuation, for school purposes. The proposed amendment also states that in addition to this, the qualified property tax paying voters of the school district may vote to pay a tax, not to exceed in any one year fifty cents on the one hundred dollar valuation of the property subject to taxation in the district. This limitation does not apply to incorporated cities or towns constituting separate and independent school districts. The other proposed amendment in Texas provides that a majority of the property tax paying voters in any county, or one or more of its political subdivisions, may vote a tax for road and bridge purposes not to exceed thirty cents on the one hundred dollars valuation of property subject to taxation in the county or political subdivision, or may issue bonds not to exceed 20 per cent of the assessed value of the real property in such district.

In Wisconsin, according to a proposed amendment, the State may appropriate money already in the treasury or to be raised by taxation for the construction or improvement of public highways. Section 1 of article 8, reads: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall provide." To this it is proposed to add the following: "Taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

Such are the amendments as offered in the various States in some detail. If we consider these same amendments from the point of view of subject matter and not according to States, we get the following results: Proposed constitutional amendments providing for the separation of the sources of State and local revenue, California and Missouri; for the substitution of general for specific provisions, South Dakota and Washington; for the gross receipt tax on corporations, California; income tax, South Dakota and Wisconsin; inheritance tax, South Dakota; for a limitation of the tax rate, Montana and Utah; for road and bridge purposes, Minnesota, Missouri, Texas, and Wisconsin; for the repeal of the mortgage tax law, California; for school purposes, Texas; and for damages from wind and hail, Minnesota.

ROBERT ARGYLL CAMPBELL.

Taxation—Constitutional Amendment in Ohio. During the present sessions of the Ohio legislature a joint resolution (H. J. R. No. 75 and S. J. R. No. 53.) has been introduced in both houses providing for an amendment to art. 12, sec. 2. The important part to be amended reads as follows: "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money." This constitutional provision originated in Ohio in 1851, when the present constitution was adopted. Almost an exact copy of this provision may be found in the Arkansas constitution of 1868 (art. 10, sec. 2), since displaced by a new constitution, and in the North Carolina constitution of 1868 and 1876 (art. 5, sec. 3) the constitution of the latter date being still in force. Provisions somewhat similar may be found in other States.

Several attempts have been made to amend that part of sec. 2 of the Ohio constitution quoted above, but every attempt thus far made has failed mainly because of the method required to be used in voting for or against proposed amendments under the Ohio law. In 1906 the gov-

error of Ohio, in obedience to a general public sentiment throughout the State appointed an honorary tax commission to examine the tax laws and recommend such changes or amendments as would adjust any inequality existing in the burdens of taxation. This commission suggested that art. 12, sec. 2 be amended and that in place of the clause requiring that all property should be taxed by a uniform rule, the following should be substituted: "The general assembly shall have power to establish and maintain an equitable system for raising State and local revenue. It may classify the subjects of taxation so far as their differences justify the same, in order to secure a just return from each. All taxes and other charges shall be imposed for public purposes only and shall be just to each subject. The power of taxation shall never be surrendered, suspended, or contracted away." If this proposed amendment is passed by the legislature and favorably considered by the people, it will mean that this narrow, restraining constitutional limitation on the legislature and the tax system of the State, will be removed and the legislature allowed to introduce a system more in harmony with present day needs, demands and experiences.

ROBERT ARGYLL CAMPBELL.

Home Rule in Taxation. A bill has been submitted to the Rhode Island legislature, which, if passed, will provide for home rule in taxation by permitting any town or city to exempt certain forms of personal property and improvements. It states that if one-tenth of the qualified electors of any town or city file a petition with the town or city clerk asking that the electors may cast their ballots for or against the exemption of personal estate, or improvements, or both, from taxation, then the town or city clerk must give notice that such petition has been filed, in his warrant calling the town, ward, or district meeting and must also provide ballots having the issue asked for in the petition printed thereon. If a majority of the electors voting at the election are in favor of exempting either personal property or improvements, or both, then such property is to be exempt and the town or city may assess its ratable estate in excess of one and one-half per cent of its ratable value.

ROBERT ARGYLL CAMPBELL.

Telephone and Telegraph Companies—Regulation. A bill (H. B. no. 763) has been introduced in the Ohio legislature of 1908 regulating

and declaring telephone and telegraph companies whose lines are wholly or partially within the State to be common carriers.

The railroad commission of Ohio is given power to fix and regulate rates within the State, to determine how and in what manner telephone and telegraph companies may occupy public thoroughfares of cities and villages when local authorities fail to grant such rights and privileges. In fixing and regulating telephone rates, the railroad commission is to fix a reasonable rate based upon the number of subscribers, not in the aggregate, but according to the number of bona fide subscribers for telephone service which each of such telephone companies may have, but in no case is the rate so fixed to exceed a dividend earning of 8 per cent of the money actually invested by such company in its equipment.

Telephone companies are required to perform all necessary acts to connect their respective lines so that the patrons of one can talk direct to the patrons of other lines. Any willful delay in so connecting is declared an offense under the provisions of the act. In case of disagreement between the companies, the railroad commission is to order such physical connection, prescribe the manner and apportion the cost.

The bill forbids the charging of patrons of a connected line a fee in excess of that charged its own customers for similar service from the connected station to the same place, and provides that the charge for the interchange of *local* service shall not exceed five cents for a three minutes' talk, the charges to be prorated between the connecting companies.

The railroad commission is to receive and hear complaints as to the service, rates, or the manner in which such telephone or telegraph companies are occupying the public highways so that it can expeditiously and effectively carry out the provisions of the act, and is given such other powers in the regulation of telephone and telegraph companies as it is authorized and empowered to do under the law creating the railroad commission.

A penalty of not more than \$500 for the first and not more than \$1000 for each subsequent offense is prescribed.

The Ohio legislators have introduced other bills relating to the regulation of telephone companies. H. B. no. 715 authorizes the councils of cities and villages to regulate and by ordinance fix telephone rates, and grants to the cities and villages accommodations for a fire and police telephone system free of charge. H. B. no. 908 enables municipalities, at the time of authorizing the mode of the use of the streets, to enter into contracts fixing rates. H. B. no. 1037 places telephone companies

under the jurisdiction of the railroad commission of Ohio, provides for investigations as to the reasonableness of rates and services and grants to the railroad commission power to substitute a reasonable for an unreasonable rate, an adequate for an inadequate service. By this bill it is declared unlawful for two or more competing telephone companies, by contract, purchase and sale, or otherwise, to combine the exchange or exchanges, or any long distance or toll lines owned or controlled by either of them, or for any telephone company, to connect any telephone exchange owned or controlled by it with the toll or long distance lines of any competing company.

LAURA SCOTT.

Wage Boards in Sweated Industries. A bill providing for the establishment of wage boards in sweated industries has been introduced in the British parliament. The bill applies only to particular trades specified in the schedule, but the home secretary is empowered to extend its provisions to other trades.

The wage boards are to be composed of representatives of employers and employees in equal numbers and a chairman chosen by the members or nominated by the home secretary. Power is given to the boards to fix a minimum rate for time-work or for piece-work and the rates may be varied according to the kind of work, the persons employed, or the locality of the employment.

The payment of the minimum rate by employers is to be enforced by the factory inspectors and the payment of less than the minimum is made punishable by imprisonment.

NEWS AND NOTES

THE FIRST PAN-AMERICAN SCIENTIFIC CONGRESS

The fourth Latin American Scientific Congress will meet in Santiago, Chile, on the twenty-fifth of December, 1908. It will convene under the auspices of the Chilean government. Previous congresses were held at Buenos Ayres, Montevideo and Rio de Janeiro. The present congress will be known as the First Pan-American Scientific Congress, because, for the first time, all the nations of America, North and South, have been invited to send representatives. The program embraces all the sciences and humanities. For political science, the following themes of discussion have been set by the committee of organization under the presidency of Valentin Letelier, rector of the national university of Chile:

I. PUBLIC INTERNATIONAL LAW

1. The influence which the discovery and conquest of America and its colonial development have exercised upon international law.
2. Principles of international law which, first proclaimed in American congresses, treaties, or practices, have since been accepted by European states. How far have these principles been the result of the special political and economic conditions in America?
3. The support which American countries have lent to certain international principles and conventions of a world-wide character.
4. The influence which the principles of international law have exercised over the domestic legislation in American countries.
5. Is there any possibility of the American states accepting a group of principles or rules of international law in respect to which as yet no general accord is possible?
6. Considering the particular conditions of the new continent, can we speak of the existence of an American international law, and what would be the conception which should be formed of this law, of its basis, and component materials?
7. Admitting the existence of an American international law, how should instruction in it be organized?
8. Bases for a codification of public and private international law on this continent.

II. PROBLEMS OF INTERNATIONAL LAW IN AMERICA

1. How far the different forms of states recognized in international law can be applied to America.

2. Responsibility of the American governments for the acts of savage tribes which inhabit territories under their sovereignty, but not under their effective control.
3. Responsibility for acts of indigenous tribes which are under effective authority.
4. Responsibility for the acts of nomad tribes wandering within the frontiers of a state.
5. Responsibility for the acts of civilized persons or native tribes who are in disputed territories.
6. Responsibility for damage caused to foreigners in consequence of civil wars, strikes, and other interior commotions.
7. The importance of historical frontiers, or the *uti possidetis* of 1810. The manner in which American countries have fixed their boundaries.
8. Uniform regulation, for the countries of America of neutrality in the case of civil war.
9. Is it desirable that the American states should adopt the principle of free navigation of international rivers?
10. The institution of nationality in America.

III. CONVENTIONAL INTERNATIONAL LAW

A. Critical study of the following conventions framed for the states of America in the second and third international conferences.

1. The reorganization of the international bureau of American republics.
2. Condition of naturalized citizens who renew their residence in the country of their birth.
3. Rights of foreigners.
4. Pecuniary claims for damages.
5. Exercise of liberal professions.
6. Sanitary police.
7. Patent and trade-mark legislation.
8. Literary and artistic property.
9. Exchange of official scientific, literary, and industrial publications.
10. Extradition and protection against anarchism.
11. Codification of public and private international law.

B. Critical study of the following conventions framed in the South American congress of private international law: (Montevideo.)

1. International civil law.
2. International commercial law.
3. International penal law.
4. International law of procedure.

IV. DIPLOMATIC HISTORY

1. General outline.
2. The Latin-American international conferences.
3. The international Pan-American conferences.
4. Movements of approach between American states—attempts of confederation and alliance.
5. Diplomatic reclamations against Latin-American states.

International Politics

1. What are the best means, of a political and economic nature, to bring about relations of friendship among the American states?
2. The basis on which diplomatic and scientific Pan-American congresses should be organized.
3. Means which would be put in practice by the American states for assimilating the foreign immigrants to the national element?

V. CONSTITUTIONAL AND ADMINISTRATIVE LAW.

1. Influence of foreign constitutions on those of Latin-American states.
 2. Development of the political institutions in these states.
 3. *Id.* in the United States.
 4. The organization and functioning of the parliamentary system in American states which have adopted this form of government.
 5. Considering the habits, traditions and education of American peoples, is it desirable to introduce the referendum, and if so, in what form should it be adopted?
 6. Results which have been obtained in American countries through reforms designed to give the people direct participation in public affairs.
 7. Suffrage in the different American countries. Comparison of results obtained through the different systems of voting.
 8. The municipal régime in American states. Participation of foreigners in local administration.
 9. The self-governing commune and its workings on the new continent.
 10. The liberty of teaching.
 11. Influence of associations and the development of public opinion on the political and administrative system of American states.
 12. Legal and political situation of the indigenous tribes in these states.
- Comparative study of American and European constitutions on the following points:
1. Conception of sovereignty.
 2. Representative system.
 3. Parliamentary system.
 4. Unitarism and federalism.
 5. Centralization and decentralization.

There are similar series of themes for political and social economics, criminology and police administration.

THE MICHIGAN CONSTITUTIONAL CONVENTION OF 1907-1908

JOHN A. FAIRLIE

This convention was called by vote of the people of Michigan in April, 1906. At its session last year, the legislature provided for the election of delegates, which took place in September. The convention met on October 22, and completed its work on February 21; and the revised

constitution will be submitted to the electors at the general election in November of the present year.

Several previous efforts had been made to secure a general revision of the present constitution, which dates from 1850; but proposed revisions submitted to the electors in 1867 and 1873 were both defeated, and until the present time further attempts to call a convention have failed of success. It can be said, however, that the present prospects are strongly in favor of the adoption of the revision now submitted. It is certainly in its favor that in the convention itself not a single negative vote was recorded at the final vote in the complete revision.

The convention was a notable body of men, far above the ordinary Michigan legislature in character and ability. It consisted of ninety-six members, three from each of the senatorial districts in the State. Sixty were lawyers. Forty-four had been students at the University of Michigan, and others had received a college education at other institutions. A good proportion had held public positions before, but many, including some of the ablest and strongest members, had no previous active political experience. There were only eight democrats in the convention; but party lines were not drawn, and the main divisions were between the more radical and the more conservative groups.

A good deal might be said about the procedure and methods of the convention. But mention can only be made of the full publicity and careful discussion given to all matters. Much of the detailed work was done in committees; but every section was considered in committee of the whole before passing *second* reading, and the complete revision was again considered in committee of the whole before third reading. The committee on arrangement and phraseology also exercised a larger influence than is usual in revising the language and arrangement of the various sections and articles.

A number of important subjects were debated at length. Most time was given to the proposed provision for initiating constitutional amendments by popular petition; and the complete record of the four days debate is doubtless the most complete discussion of that subject yet in existence. Other questions which received a good deal of attention were the home rule provisions for cities and villages, prohibition, woman suffrage, and the fellow servant rule. While many other subjects were considered and decided after briefer and less formal speeches.

The new constitution does not accomplish any radical revolution, but it does include many important changes. The foundation and the main framework of government remain as before. The revision is about

the same length as the old constitution, and contains no such detailed legislative provisions as in the constitution of Oklahoma. At the same time, the revision does include many significant features—notably in the article on local government (especially the sections on cities and villages), the regulation of legislative procedure, the increased authority of the governor, and the compromise adopted on the question of the initiative. Some of the provisions may seem radical to the more conservative east; but as a whole it occupies a middle position between the constitutions of the older eastern States, and those of the newer States with their experiments in novel ideas. It may be called conservatively progressive; and constitutionally as geographically Michigan belongs to what has been called the middle-west, but what may now be more properly called the middle-east.

Taking up the more important changes, we may begin with the new sections in regard to cities and villages, granting a wide measure of "home rule." Hitherto Michigan has retained the old system of special legislation, which has given rise to the usual abuses of hasty and sometimes partisan measures, while in some matters provisions of the old constitution have prevented the legislature from granting powers to cities it has been willing to confer. It is now provided that State laws on city government must be general laws applying to all cities and all villages; and under such general laws—as well as the constitution and general laws of the State—each city and village shall have power to frame, adopt and amend its charter, and to pass all laws and ordinances for its municipal concerns. Specific power is granted to control the grant of privileges in the public streets (franchises being limited to thirty years), to acquire and maintain works involving the public health and safety, and also by a three-fifths vote of the electors to acquire and maintain public utilities for supplying water, light, heat, power, and transportation. For such public utilities provision is made for borrowing money, beyond the general debt limit, by mortgaging the plant and franchise of a particular utility. The legislature will limit the rate of taxation and restrict the power to borrow money and contract debts.

These provisions give the cities and villages a large, but not an unlimited, freedom in dealing with their own affairs; and it is hoped that the elimination of special legislation will give the legislature a better opportunity to consider the broader problems of State legislation.

More extended powers are also given to counties; but by specific rather than such a general grant as has been conferred on cities and villages. And the main tendency in this direction is indicated by the new

title of local government, given to the article containing the various provisions on this subject.

The long discussion on the popular initiative resulted in a fairly conservative compromise. Amendments to the constitution may be formally proposed by petition of the electors, signed and verified before the regular registration or election officials, and when an amendment is so proposed by 20 per cent of the vote cast for secretary of state at the preceding election, it must be submitted to the voters, unless disapproved by a majority vote of the legislature in joint session. The legislative veto was strongly opposed by the advocates of direct legislation. It seems probable that it will not be used against any reasonable proposal; but it affords a possible check in case of an unjust proposal in times of special excitement. Special provision is also made for voting on alternative proposals on the same subject.

The former method of proposing amendments by a two-thirds vote in each house of the legislature is also retained. Incidentally it is provided that all proposed amendments must be published, and must also be printed in full on the ballot, so that the voters may know on what they are asked to vote.

Some conditions laid down in the legislative act organizing this convention led to the insertion in the new constitution of provisions, similar to those in the New York constitution of 1894, definitely providing for the election of the next convention, when called by the people, and indicating its authority, without further action by the legislature.

In a sense the home rule provisions will limit the freedom of the legislature, but only to leave it more free for other work. Various other provisions are aimed at securing fuller publicity and consideration for the measures before that body. All bills in each house must be printed for five days before passage. No special acts may be passed where a general law is applicable; and all special acts must be subject to a local referendum. General laws may also be submitted by the legislature to a vote of the electors.

The powers of the governor have been somewhat increased. His veto power is extended over the items of appropriation bills, and his authority to investigate the work of any State executive or administrative office is made more definite. These additions should increase his influence and responsibility for the State government.

Salaries of State officers in Michigan have until now been retained at the absurdly low figures named in the constitution of 1850; and these are now increased to moderate amounts. The governor and attorney-

general will each receive \$5000 a year, and the other elective officers \$2500 each.

A few minor changes are made in the judicial system; but the most important modifications are those permitting further changes by the legislature—notably that which will permit the establishment of a circulating system of circuit judges.

Other changes are of less importance, and deal mainly with matters of local interest. Express and telephone companies will be taxed on the ad valorem basis. The power of taxation may not be surrendered or suspended by any grant or contract. A uniform system of accounting and audit for similar State officials and boards and county officials is required. The salaries of public officials may not be increased during the term for which they are elected. The State superintendent of public instruction will be elected at the biennial spring elections with the judges and regents of the university. Women taxpayers are given the right to vote on all questions involving the direct expenditure of money or the issue of bonds. The power to regulate freight and express rates may be delegated to a commission.

These and other provisions mark the new constitution as a decided advance on the existing instrument; and its adoption, as now seems probable, will open the way to more efficient public administration and to a distinct improvement in the management of the public business.

An interesting question was raised as to the date for submitting the revised constitution to the electors. The legislative act organizing the convention had provided that it should be submitted in April of the present year. The convention did not adjourn until within a few weeks of that time, and deciding that a longer time for consideration was advisable, and holding that the legislature could not bind the convention, it provided that the revision should be submitted in November.

In mandamus proceedings the supreme court of the State decided in favor of the November vote, three of the eight judges dissenting. But four of the five judges in the majority did not accept the view that the convention had plenary power. They held that the provision in the existing constitution requiring "amendments" to be submitted at a regular State election applied also by implication to a complete revision, and that on this account the legislative provision for submission in April of this year was not valid.

PERSONAL AND BIBLIOGRAPHICAL

J. W. GARNER

In order that, beginning with 1909, the volumes of the REVIEW may correspond with the calendar year, it has been decided to omit the publication of the August, 1908, number and have the November, 1908, issue constitute the fourth number of volume II.

Three German professors of public law have recently died at advanced ages. They were Felix Stoerk of Greifswald, Karl Fricker of Leipzig and Heinrich Dernburg of Berlin. Since Professor Dernburg's death a new edition (the fourth) of his *Bürgerliche Recht des deutschen Reiches und Preussen* has been issued from the press.

Friedrich von Wyfs, professor of legal history in the University of Zurich recently died in the eighty-ninth year of his age.

Friedrich Stein, a law professor in the University of Halle and the author of a new work entitled *Zur Justizreform* which has recently attracted wide attention among those interested in legal reform in Germany, has been appointed to an honorary professorship in the University of Leipzig.

Dr. Karl Neumeyer has been appointed professor of international private law and administrative law in the University of Munich.

A new chair for the teaching of the history of political science has been established at the Sorbonne with Adolphe Landry as the professor in charge.

Edward Henry Strobel, Bemis professor of international law at Harvard University from 1898 to 1906 and general adviser to the king of Siam, died at Bangkok, January 15, 1908, in the fifty-third year of his age. Mr. Strobel was a native of South Carolina, a graduate of the Harvard Law School and in early life filled several quasi-diplomatic missions. Later he served successively as secretary of legation, assistant secretary of state, minister to Ecuador and Chili, and in 1903 became adviser to the king of Siam. He was highly esteemed by all who knew him, his scholarship was of a high order and his success as a diplomat

remarkable. He exerted a large influence on the foreign policy of Siam, his crowning achievement being the negotiation of the Franco-Siamese treaty of 1907.

Henry Loomis Nelson, for the past six years David A. Wells professor of political science at Williams College, died on February 29, in his sixty-second year. Mr. Nelson graduated at Williams College, studied law at Columbia and was admitted to the bar in 1869. He served as private secretray to Speaker Carlisle, was for a time principal editorial writer for the *Boston Post* and in 1894 became editor of *Harper's Weekly* a position he held for four years. He was author of several books dealing with economic subjects.

Mr. J. C. Bancroft Davis, three times assistant secretary of state of the United States, secretary of the joint high commission which met at Washington, 1871, to conclude a treaty for the settlement of the *Alabama* claims, the agent of the United States before the Geneva arbitration tribunal, minister to Germany 1874-77, judge of the United States court of claims and reporter of the supreme court of the United States, in succession, died at Washington in his eighty-fifth year, on December 27, last. Mr. Davis managed the case of the United States before the Geneva tribunal with remarkable skill and it was the testimony of Count Sclopis that the decision in favor of the American claims was largely due to the successful manner in which the case was presented by Mr. Davis. He was the author of a volume of *The Treaties and Conventions of the United States* with elaborate notes, and also a volume entitled *Mr. Fish and the "Alabama" Claims*.

Dr. Robert C. Brooks, professor of economics in Swarthmore College since 1904, has been appointed professor of political science in the University of Cincinnati. Mr. Brooks is a graduate of the University of Indiana, received his doctor's degree at Cornell, studied at Halle and Berlin and was editor of *Municipal Affairs*, 1896-97.

The readers of THE POLITICAL SCIENCE REVIEW will regret to learn that Prof. John Bassett Moore of Columbia University has been compelled, on account of overwork which has affected his eyes, to give up his academic duties this year and take a long delayed vacation. During the seventeen years he has been at Columbia, Professor Moore has taken no leave except during the Spanish-American war when he was in the pub-

lic service as assistant secretary of state. His courses in international law are being given by Dr. George Winfield Scott, of the law library of congress.

Right Hon. James Bryce, British ambassador to the United States, will deliver the Dodge lectures on the Responsibilities of Citizenship at Yale next fall, Señor Barbossa of Brazil, who was first selected, being unable to accept the appointment.

Edmond Kelley, a well known American lawyer who for many years has resided in Paris, the author of *Government or Human Evolution*, in two volumes, recently a convert to socialism, is the author of a sociological study entitled *The Elimination of the Tramp* which has lately appeared from the press of G. P. Putnam's Sons. It is mainly a description of the Swiss system of free labor self-supporting tramp colonies, through which, the author claims, vagabondage in Switzerland has been eliminated without cost to the state beyond the initial expense of purchasing land and constructing buildings.

Clifford N. Johnson of Detroit has been awarded the first prize of \$1000 offered by the Merchant Marine League of the United States for the best essay on the subject How to Build Up Our Merchant Marine in the Foreign Trade. Four hundred essays were submitted in competition for the prize. Mr. Johnson's plan recommends the granting of small subsidies from a fund to be established by increased tonnage duties.

The fourteenth annual Lake Mohonk conference on arbitration will be held this year on Wednesday, Thursday and Friday, May 20, 21 and 22. A large attendance is expected. There will be six sessions: one, devoted to the work of the second Hague conference; one to the relations of colleges and universities to the arbitration movement; one to the relations of business men to the arbitration movement; one to Pan-American interest in and contributions to the movement; and two to the general subject of arbitration. There will be more than the usual number of distinguished speakers. Among those who have already accepted invitations to make addresses are Sir Charles Fitzpatrick, chief justice of Canada; Hon. James Brown Scott of Washington; President Benjamin Ide Wheeler of the University of California; Chancellor H. C. White of the University of Georgia; Señor Don Anibal Cruz, minister

of Chili to the United States; Señor Don Joaquin B. Calvo, minister of Costa Rica to the United States, Hon. John Barrett of Washington and Dr. Benj. F. Trueblood of Boston.

M. André Tardieu, foreign editor of the Paris *Temps* delivered a series of lectures on France and the Alliances at Harvard University in February. M. Tardieu though still in his thirty-second year has already had a brilliant career as a journalist and a diplomat. He is the author of two books, both of which attracted wide attention at the time of their publication: *The Diplomatic Questions of the Year 1904* and *The Conference of Algeciras—A Diplomatic History of the Moroccan Crisis*.

An English translation of the German imperial civil code of 1900, made by a Chinese graduate student at Yale, Dr. Chung Hui Wang, has been published in London by Stevens and Sons. The translation is regarded by competent authorities as an excellent one and constitutes a remarkable achievement for one to whom neither German nor English is a native tongue.

President Edmund J. James of the University of Illinois and Prof. L. S. Rowe of the University of Pennsylvania have been appointed by the secretary of state as members of a committee to coöperate with the department of state in carrying out the resolutions adopted by the last Pan American conference held at Rio Janeiro in 1905.

The fourth Latin American scientific congress will be held in Santiago, Chili, in December of this year. The main purpose of these congresses is to bring together the best scientific thought on the leading problems of common interest to the American republics. The forthcoming congress will be divided into nine sections, one of which will be devoted to jurisprudence and political science. A strong effort is being made to induce congress to make an appropriation for sending a suitable number of delegates from the United States.

The extensive library of rare German socialistic literature collected by Herman Schlüter, editor of the New York *Volkszeitung*, has been presented to the University of Wisconsin by Mr. William English Walling. Besides the works of German socialist authors, the collection contains many official documents and files of socialist periodicals.

The name of the *American Law Register* has been changed to the *University of Pennsylvania Law Review*—a name which emphasizes the fact that the magazine is edited by the law department of that university.

Hon. Samuel W. McCall, representative in congress from Massachusetts, is delivering a series of lectures on the Blumenthal foundation at Columbia University. His subject is the Business of Congress.

The American branch of the Association for International Conciliation (P. O. sub-station 84, New York City) has issued the following documents which are sent gratis to persons requesting them:

(1) Results of the National Arbitration and Peace Congress, by Andrew Carnegie. April, 1907. (2) Program of the Association for International Conciliation, by Baron d'Estournelles de Constant. April, 1907. (3) A League of Peace (address delivered at the University of St. Andrews) by Andrew Carnegie. November, 1907. (4) The Results of the Second Hague Conference, by Baron d'Estournelles de Constant and Hon. David Jayne Hill. January, 1908. (5) The Work of the Second Hague Conference, by James Brown Scott. January, 1908.

The Proceedings of the National Municipal League for 1907 have been published. The volume contains articles on the Galveston and Des Moines plans, electoral reform, municipal health and sanitation, and other current municipal topics.

The Proceedings of the first national conference on state and local taxation, held under the auspices of the National Tax Association at Columbus, Ohio, November 12-15, 1907, have been published in a handsome volume (The Macmillan Company, 1908, pp. xx + 675). Some forty-eight papers and addresses are given. The volume should be of very great value to all persons seeking to learn present day opinions regarding the best modes of obtaining State and local revenues.

Messrs. G. P. Putnam's Sons have recently published a new book entitled *South America on the Eve of Emancipation*, by Prof. Bernard Moses of the University of California. A new edition of *The Establishment of Spanish Rule in America* by the same author has also lately appeared from the same press.

The Journal of the Constitutional Convention, in two volumes, by Gailard Hunt (Putnam's, 1908) contains, complete, Madison's record of the

proceedings of the Philadelphia convention together with the accounts of Yates, King and Pierce. There are also numerous comments in footnotes by the editor.

Several important bulletins have recently been issued by the legislative reference department of the Wisconsin Free Library. Among them we note one on the *Initiative and Referendum* and another on *The Recall*. In this connection it may be noted that a legislative reference department has been organized under the direction of the Public Library Commission of North Dakota.

Messrs. Giard et Brière of Paris have brought out a French edition of Prof. F. J. Goodnow's *Principles of the Administrative Law of the United States*. The translation is made by Prof. Gaston Jèze, of the University of Toulouse.

Scientific Assistance in Law Making, by Prof. John B. Phillips of the University of Colorado, is the title of an interesting reprint from the University of Colorado Studies, dealing with the activities of the newer agencies of legislation such as legislative reference bureaus, bill drafting commissions, clerks of bills, etc.

Miss Elfrida Everhart, reference librarian of the Carnegie Library of Atlanta, is the author of a *Handbook to the Public Documents of the United States*, intended to be a guide to the publications of the national government. Each publishing division of the government is first described, followed by a list of its publications. There is a brief historical account of each document together with a description of its form, use and character. An elaborate index adds further value to the handbook.

A new edition of Andrews' *American Law*, "amplified by fuller treatment of all subjects" is announced by Callaghan and Company (Chicago). Except Kent's *Commentaries* there is probably no book which furnishes a more convenient and succinct view of American law.

The lectures on socialism delivered in various parts of the country last year by Mr. W. H. Mallock at the invitation and under the auspices of the National Civic Federation have been recast and published by Harpers under the title *A Critical Examination of Socialism*. Although eminently fair Mr. Mallock's lectures contain a searching criticism of the theories of socialism.

A new contribution to ancient legal history is *Israel's Laws and Legal Precedents* by Prof. Charles Foster Kent, of Yale University (Scribners), being a continuation of his earlier work published in 1904. The present work classifies the Hebrew legislation according to subjects and arranges it in the chronological order of the codes in which it occurs. Its usefulness is increased by the addition of brief expository footnotes.

Among the new and forthcoming publications of the Columbia University Press are: *Constitutional Government in the United States*, by Woodrow Wilson and *Practical Problems of American Development*, by Albert Shaw.

The second volume of Mr. J. B. Atlay's *Victorian Chancellors*, containing biographical sketches of the "illustrious men into whose hands the great seal of England was entrusted by Queen Victoria" is announced to appear from the press of Little, Brown and Company this spring.

The index to the federal statutes which Dr. Geo. Winfield Scott and Mr. Middleton G. Beaman of the law library of congress have had in preparation will be published by the government printing office about July 1. The work will index the subject matter of the revised statutes of 1873 and the legislation of permanent and general character since enacted. It is the first attempt ever made in this country to prepare a scientific index in detail to the statutes. The volume, including the tables of repeals and amendments will contain about 1500 pages. It will be sold by the superintendent of documents. The index to the federal statutes of private and local character will be prepared during the coming year. The sections dealing with the penal statutes in the draft of the federal revised statutes have been passed by the senate and are now before the house of representatives. These sections embrace about 200 pages of the whole draft of some 2400 pages. With the increase in the quantity of statutes, it has become impossible for most of the legislatures to consider and enact in a single session the draft of a general revision of the statutes. Congress inaugurated the preparation of the present revision in 1897 by establishing a commission of three members. In December, 1907, they reported to a joint-committee composed of five senators and five representatives. The joint-committee has since employed several lawyers to examine the draft submitted by the commission. The total cost of the undertaking to date is nearly \$400,000. It is understood that the joint committee will continue the employment of

its legal advisers and will introduce next session another portion of the draft.

New publications by the Macmillan Company, most of which are now ready for delivery are: *An American Survey of England*, in two volumes, by Prof. A. Lawrence Lowell; *Modern Egypt*, by the Earl of Cromer; *The Meaning of Socialism*, by H. G. Wells; *The United States as a World Power*, by Prof. A. C. Coolidge; *As Others See Us*, by John Graham Brooks; *The Coming Struggle in the East*, by B. L. Putnam Weale; *The Science of Jurisprudence*, by Hannis Taylor; *Popular Participation in Law Making*, by Chas. Sumner Lobingier; *Government By the People*, by Robert H. Fuller; and *The Government of European Cities*, by Prof. W. B. Munro.

English publications announced by P. S. King and Son are: *The House of Lords*, by J. W. Wylie; *A History of the 1900 Parliament*, by James F. Hope; *Parliamentary Representation: An Inquiry into our System of Parliamentary Representation*, by Joseph King, with an introduction by Rt. Hon. L. Harcourt, M.P.; and the *Municipal Year Book for 1908*, by Robert Donald.

In a work entitled *The American Government, Organization and Officials, with the Duties and Powers of Federal Office Holders*, by H. C. Gauss (New York: L. R. Hamersley and Company. 1908. Pp. xxiv + 871.) which the author describes as "an original summarization," there is furnished a compilation of facts which cannot but be of great convenience to all who have occasion to seek exact information regarding the details of the organization and operations of the federal government. The size of the work, nearly nine hundred closely printed pages, indicates its comprehensive character. A fairly adequate index is furnished, but no table of contents. It is very greatly to be regretted that references are in no cases given to the statutes or other authoritative sources whence the facts are obtained. The binding is good, but the paper poor.

In a small brochure of fifty-six pages, entitled *The New Electoral Law for the Russian Duma* (University of Chicago Press, 1908), Prof. Samuel N. Harper, associate in the University of Chicago, gives a very clear account of the law governing the election of representatives to Russia's third duma, which was convoked November 14, 1907.

In the volume *School Reports and School Efficiency* by David S. Snedden and William H. Allen (New York: The Macmillan Company, pp. 183), the aim is to show how a superintendent or board of education may devise a report which will be both a source of publicity as well as a means of administrative control of this most important branch of public service. There has been need for such a work and its appearance is therefore to be welcomed. Mr. Snedden is one of the instructors of the Teacher's College, New York, and Mr. Allen is late secretary of the committee on physical welfare of school children.

Socialism Before the French Revolution, by W. B. Guthrie (The Macmillan Company, 1908), is a worthy addition to the increasing literature of socialism. In an introductory chapter Mr. Guthrie reviews the literature of the period covered by his study and examines socialism as a "system of thought and action" illustrating this topic by citations from various writers from Plato to the French Revolution. Successive chapters treat of the breakdown of English feudalism, the development of capitalism in England and the doctrines of Sir Thos. Moore; Italian socialism and particularly the theories of Campanella, the sole champion of social reform in that country; eighteenth century radicalism in France; the social teachings of Morelly, "the one who saw most clearly the need of a new system to replace the socialistic doctrines of the old;" the socialistic doctrines of the "revolutionary radicals" in France; and the difference between revolutionary socialism and that which came later. In connection with the last mentioned topic the author points out how under changing conditions the later socialism underwent many modifications though containing much in common with the former.

Students of municipal science will be interested in a report of the housing committee of the St. Louis Civic League, entitled *Housing Conditions in St. Louis*. The report contains a careful examination of existing conditions, suggested measures of a preventive character and recommendations looking to the abolition of existing evils.

A new and enlarged edition of Burge's *Colonial Law*, in five volumes, edited by Renton and Phillimore, assisted by a number of eminent lawyers is announced by the Boston Book Company. The introduction to the former edition has been expanded into a new volume in the present edition. The new volume reviews the principal systems of jurisprudence of the world and summarizes the political history, legal sys-

tem and judicial organization of each of the British colonies. The law of British India and the Roman-Dutch law are treated more fully than in any work heretofore published.

The Process of Government, A Study of Social Pressures, by Arthur F. Bently (University of Chicago Press, 1908), is a thick volume of 500 pages, described by the author as "an attempt to fashion a tool" and by the publishers as "a technical study of the methods which must be used in the scientific interpretation of the phenomena of government." Part I, entitled *To Prepare the Way*, is mainly psychological and sociological; part II, entitled *Analysis of Governmental Pressures*, contains chapters on Public Opinion and Leadership; Government; Law; Classification of Governments; Separation of Governmental Agencies; the Pressure of Interests in the Executive, the Legislature and the Judiciary; Political Parties; Representative Government, etc. A hasty reading of some of these chapters fails to impress the reviewer with their value as a contribution to the literature of political science, though the work as a whole will doubtless interest students of social institutions. It bears evidence of wide and careful reading.

Police Power: State and Federal (Philadelphia: Rees, Welsh and Company. 1907. Pp. xxviii + 338), is the title of a work by Mr. Willis Reed Bierly. As a systematic treatise on the police power, the volume has no value. It makes no attempt at completeness. It is not systematically arranged, and underlying principles are not searched out. To lawyers and legislators of Pennsylvania the work may, however, prove to have some usefulness in that more than a hundred statutes of that State, illustrating the police power, are quoted, and the judicial decisions relating thereto are referred to.

A new contribution to the literature of political theory, entitled *From Gerson to Grotius*, being the Birkbeck lectures at Trinity College, Cambridge, 1900, has been made by John Neville Figgis, a parish rector in England and a former lecturer in St. Catherine's College, Cambridge. Aside from an introductory chapter of a general character there are essays dealing with the conciliar movement and the Papalist reaction; the political doctrines of Luther and Machiavelli; the *Politiques* and religious toleration; the Monarchomachi; the political relations of the Jesuits; and the Netherlands revolt. At the end of the book are thirty-five pages of critical notes.

The McClure Company has published an English translation by Jeanne Mairé, of Lemaitre's *Rousseau*. The aim, the author states, has been to furnish not a critical biography of Rousseau but a history of his sentiments.

Mr. C. T. Carr, the author of the Yorke prize essay entitled the *General Principles of the Law of Corporations* has published another Yorke prize essay entitled *Collective Ownership Otherwise than by Corporations or by Means of the Trust*: (New York: G. P. Putnam's Sons; London: Cambridge University Press. 1907. Pp. xx+118). In succinct terms the fundamental legal principles at the basis of common ownership by man and wife, co-heirs, joint tenants, tenants in common, partners and communities as owners are considered in a scholarly manner.

Legal Essays. By James Bradley Thayer, Boston: The Boston Book Company. 1908. Pp. xvi+402. In this volume fifteen essays of the late Professor Thayer have been collected and republished by his son Ezra Ripley Thayer. This was a work well worth doing. The essays are valuable in themselves, and illustrate by their scientific and historical method a standard of legal writing which needs to be cultivated in this country. The opening essay, *The Origin and Scope of the American Doctrine of Constitutional Law* is, in the reviewer's estimation, one of the most important constitutional essays that has been published in this country. In the paper entitled *A People Without Law*, the ethical and political as well as the constitutional aspects of the difficult Indian question are lucidly dealt with. Professor Thayer's great knowledge of the history of the law is especially shown in a series of articles, reprinted from the *American Law Review*, which consider declarations as a part of the *res gestae*. The other essays, which there is space only to enumerate are: *Advisory Opinions*, *Legal Tender*, *Gelpcke v. Dubuque*, *Our New Possessions*, *International Usages—A Step Forward*, *Dicey's Law of the English Constitution*, *Law and Logic*, *A Chapter of Legal History in Massachusetts*, *Trial by Jury of Things Supernatural*, *Bracton's Note Book*, *The Teaching of English Law at Universities*.

Prof. Frederic J. Stimson's recent lectures before the Lowell Institute have been published under the title *The American Constitution: The National Powers, the Rights of the States, the Liberties of the People* (Scribners, 1908). The first lecture deals with the meaning of the Constitution which he undertakes to prove is not a "mass of dry rules but the very substance of our freedom." The next four deal principally with

the constitutional liberties of the citizen with particular reference to their historical origin, nature and development. The sixth is devoted to a consideration of the division of powers between the legislative, executive and judicial departments and between the national government and the States. The seventh and eighth under different titles deal mainly with interstate commerce and the control of trusts and corporations. The lectures are written in an entertaining style, the author's exposition of the constitutional guarantees of liberty is simple and instructive and his interpretation of constitutional questions is sound and logical. He is a vigorous defender of the rights of the States and sees in the increasing extension of the power of the national government nothing but evil. He charges congress with usurping the powers of the States in regard to trade and commerce and expresses the opinion that if the policy of the present administration could be carried out the States would be deprived of their police powers and reduced to the position of mere administrative districts. He criticises the practice of the federal courts in issuing injunctions in labor disputes and deprecates the growing tendency of those tribunals to assume jurisdiction of controversies which have heretofore rested with the State courts. Most of our anti-trust legislation, he contends, is unnecessary, the subject matter in nearly every case being covered by the common law. Some of the provisions in the federal anti-trust and railway regulation statutes he finds very objectionable and subversive of the principles of civil liberty, such for example as the power conferred on the executive to single out particular corporations for attack without molesting others equally guilty. Some may regret Mr. Stimson's frequent arraignment of President Roosevelt for alleged violation of the Constitution. On the second page the president is charged in connection with the Brownsville affair with "dictating what was little else than an executive bill of attainder." Elsewhere the executive is criticised for applying the term "conspiracy" to an alleged combination of citizens to prevent the nomination of a certain man to succeed him; for seeking to destroy the rights of the States; for criticising in a message to congress Judge Humphrey's immunity decision, a decision which was "perfectly right," etc. This evidence of want of judicial temperament together with a slight tendency to repetition serves to mar in a small degree a meritorious contribution to American constitutional law.

The Chicago Civic Federation has published a *Summary of the Reports of Special State Tax Commissions* which contains in concise form the

recommendations of some fourteen commissions created within the last ten years, together with their discussions of the principal subjects of taxation. The extent to which the several legislatures have followed the recommendations is set forth as far as possible in the *Summary*.

Prof. John A. Fairlie's volume of *Essays on Municipal Administration* (The Macmillan Company, 1908), is a collection of papers and articles on a variety of special topics relating to municipal problems, activities and administration. The essays—nineteen in all—are arranged in three groups: first, those relating to problems of organization and the legal relation of cities to the State; second, those dealing with municipal functions and activities; and third, those embodying the results of the author's observations on some phases of municipal government in Europe made during a visit in 1906. Most of the papers are reprints from various magazines and journals or addresses delivered before societies. They all show evidence of careful research and wide familiarity with the questions treated and their publication in convenient form will be welcomed by students of municipal administration.

Some Neglected Aspects of War, by Captain A. T. Mahan (Little, Brown and Company, Boston), is a collection of essays dealing with some questions of war not often treated in the books. Among the essays may be mentioned those entitled *The Moral Aspect of War*, *The Practical Aspect of War*, *War from the Christian Standpoint* and *The Question of Immunity for Belligerent Merchant Shipping*. There is also a paper by H. S. Pritchett entitled *The Power that Makes for Peace*, and one by Julian S. Corbett entitled *The Capture of Private Property at Sea*.

Mr. Arthur W. Dunn, head of the department of history and civics in the Shortridge High School, Indianapolis, is the author of a little book entitled *The Community and the Citizen* (D. C. Heath and Company: Boston, 1907). He undertakes to differentiate between what is usually called civics and civil government, maintaining that the study of the latter can not profitably be undertaken before the last year of the high school while the former, dealing rather with the relation of the individual to the community of which he is a part may be introduced at a much earlier stage in the educational life of the pupil. With this latter thought in view Mr. Dunn has prepared a text book which, departing from traditional methods, lays special emphasis on the elementary ideas of community life.

Books dealing with the international law of the Russo-Japanese war continue to find publishers. The latest addition to the list is entitled *La Guerre Russo-Japonaise, au point de vue continental et de droit international* (Pedone: Paris, 1908), by Nagao Ariga, a professor in the Superior School of War and Marine at Tokio and a legal councillor to one of the Japanese field-m Marshals during the late war. The author of the present work, we are told, was charged by the emperor of Japan with preparing the general report of the war so far as it took place on land. He gives particular attention to the function of the new service of legal councillors and its importance in future wars and dwells upon the excellence of the Japanese red cross organization which, he claims, should become the model for other countries.

The Future of Austria-Hungary, by Scotus Viator (Archibald Constable and Company: London, 1907) is the title of a small collection of essays, in part reprinted from the *Spectator*, the purpose of which is to show that the commonly accepted view concerning the expected dissolution of the Austro-Hungarian union with the death of Francis Joseph, is superficial and ill founded. Such a break up is not only not probable he argues but it is not even possible. Contrary to the popular impression, the heir apparent, the Archduke Francis Ferdinand, he asserts, bids fair to become a worthy successor of his uncle, possessing as he does, ability, self-reliance and the courage of his convictions. But more important still, considerations of the balance of power among the larger states of Europe require the maintenance of the status quo. Great Britain and France especially possess an obvious interest in preserving Austria-Hungary as a great power. Furthermore, the dangers of annexation by neighboring states more than outweigh the possible advantages. Finally, the need for an effective barrier against Slav aggression upon western Europe affords a strong justification for the continued existence of the present arrangement.

Les conventions relatives aux conditions du travail, by Leon Douarche (Marchal et Billard: Paris), is a study, in the main, of the collective labor contract; the formation of collective conventions and their effects and functions. A chapter is devoted to the history of collective conventions and the part which they have played in the pacific settlement of conflicts between capital and labor. An elaborate bibliography adds to the usefulness of the work.

A study of the history, organization and procedure of the lord high steward's court in England has been published by L. W. Vernon-Harcourt under the title *His Grace, the Steward; and Trial of Peers* (London, 1907).

Mr. Edward Dicey is the author of a new book entitled *The Egypt of the Future* (London, 1907). It is mainly a criticism of the British administration in Egypt and in a way is a complement to his *Story of the Khedivate*, published some years ago.

The current number of the *Journal Du Droit International Privé et de la Jurisprudence Comparée* contains a fifty-two page bibliography of books and articles relating to international law published during the year 1907. The bibliography is arranged in eight chapters, each of which is divided and subdivided according to subjects. The large output of periodical literature in this field would seem to indicate a remarkable growth of popular interest in questions of international law.

Dr. Henning Matzen, professor in the University of Copenhagen and formerly president of the Danish landsting is the author of a monograph entitled *Das Indigenatrecht im Wiener Frieden* (Universitäts-Buchhandlung: Copenhagen, 1906) being a study of the clause in the Russo-Danish treaty of 1864 relating to the nationality of the inhabitants of Denmark and Schleswig-Holstein, and a criticism of the interpretation placed on this provision by the supreme court of Kiel in 1901 and 1902.

M. Esmein, a member of the law faculty of the University of Paris, a distinguished publicist and a prolific writer on questions of public law, is the author of a new work entitled *Histoire du droit français de 1789 à 1814* (Larose et Tenin: Paris) being mainly a study of the essential principles introduced into the public law of France by the Revolution. The second part of the work deals with the constitutions, the organic laws and the code of the consulate and the empire. M. Esmein has also recently published a *Life of Gouverneur Morris: A Witness of the French Revolution*.

De l'esprit du gouvernement démocratique, by Adolphe Prins, a professor in the University of Brussels, is the title of a recent publication of Misch and Thron (Bruxelles). Classic democracy the author tells us, rests on three fundamental principles: (1) Equality of men, (2) the rule of the numerical majority, and (3) universal suffrage. Each of these

topics is dealt with in a separate chapter. A final essay is devoted to a consideration of the "elements capable of giving to a democratic régime more of resistance and reality," namely, local institutions.

A new edition (the eighteenth) of Hue de Grais's popular *Handbuch der Verfassung und Verwaltung in Preussen und dem deutschen Reiche* has recently been published by J. Springer of Berlin.

Joseph Barthélemy, professor of public law in the University of Montpellier, France, the well known author of *Droit Administratif*, has recently published a study of the controversy between the United States and Japan over the educational rights of Japanese subjects in San Francisco under the treaty of 1894. The title of the study is *Étude juridique du conflit entre le Japon et les États-Unis au sujet des Écoles de San Francisco. Droits des étrangers aux services publics de l'Etat de leur résidence. Difficultés internationales soulevées par la forme fédérale de l'Etat* (Pedone: Paris, 1907).

El Institute de Derecho Internacional, by Rafael M. deLobra, a distinguished Spanish scholar, contains a series of essays and discourses dealing mainly: (1) with the founding, organization and achievements of the Institute of International Law, including the principal rules which have been adopted at its successive sessions; (2) with the various international congresses and diplomatic conferences which have been held in Europe since 1856, and (3) an international bibliography of Spain during the nineteenth century, etc. (Alfredo Alonzo: Madrid, 1907).

The first volume of a second edition of André Weiss's (professor in the University of Paris) *Traité théorique et pratique de droit international privé* (Larose et Tenin: Paris, 1907) has lately appeared. It deals with the subject of nationality, was first published in 1892, and was crowned by the Institute of France for its excellence. The new edition contains an exposition of the legislation of all civilized states on the subject of nationality and a discussion of the numerous and difficult problems that have arisen under the citizenship and naturalization laws of the leading countries.

Prof. F. Meili of the University of Zurich has lately written a study dealing with the legal and international aspects of wireless telegraphy. His monograph is entitled *Die drahtlose Telegraphie in internen Recht und Völkerrecht* (Füssli: Zurich). A prorectorial address by Prof. Georg

Jellinek of Heidelberg entitled *The Struggle of the Old with the New Law*, is one of the new publications of Carl Winter (Heidelberg, 1907).

Hugo Reichard, a German publicist, has written an interesting study of the office of imperial chancellor, particularly as regards the legal and political aspects of his duty in countersigning the decrees and ordinances of the emperor in accordance with art. 17 of the imperial constitution; and also as regards the nature of his responsibility to the emperor. The title of the monograph is *Die Gegenzeichnung und die Verantwortlichkeit des Reichs Kanzlers auf rechtsvergleichenden Grundlage* (Gebrüder Knauer: Frankfurt, a./M., 1907).

Martinus Nijhoff, publisher at the Hague, announces that, beginning with January, 1908, he will issue a monthly list of the principal books on continental law in different languages, systematically arranged (subscription price one dollar per year), and that in February, 1908, he will issue a supplementary volume containing a catalogue of continental legal literature published during the year 1907 (124 pages; price, fifty cents).

The first number of a new quarterly periodical entitled *Zeitschrift für Politik* edited by Prof Dr. Richard Schmidt of Freiburg, i. B. and Dr. Adolf Grabowsky of Berlin, with the coöperation of a group of distinguished European scholars, appeared in October from the press of Carl Heymann (Berlin). The new magazine is to be devoted to the problems of scientific and practical politics. The first number gives promise of a publication of a high order. It contains some twenty contributions by well known scholars in their respective fields. Among them we note: The Methods and Ends of Politics, by Richard Schmidt; Administrative Reform and Politics, by Hugo Preuss; Reforms of Criminal Procedure, by Fritz Van Calker; The Problems of Modern Politics, by Hans von Frisch; The Electoral Obligation, by Heinrich Geffecken; The Monarchical Principle in Prussia, by Edward Hubrich; How is Scientific Politics Possible? by Franz von Liszt; and Sociology and Politics, by Heinrich Triepel.

The first volume of Jellinek, Laband and Piloty's newly established *Jahrbuch des öffentlichen Rechts* (J. C. B. Mohr: Tübingen. 429 pages), has set a high standard. It contains two contributions of especial value to students of political science and public law. One is by Professor Laband, entitled *The Historical Development of the Imperial Constitution Since the Founding of the Empire*, and the other by Professor Zorn, entitled

The Development of the Science of Public Law since 1866. There are in addition contributions by Professor Ullmann of Munich on The Hague Conference of 1899 and the Expansion of International Law; by Professor Freund of Chicago, on Jurisprudence and Legislation; by Professor Barthaldy of Würzburg, on Judicial Reform; by Professor Steinbach of Vienna, on Legal and Parliamentary Reform in Hungary; and by Professor Burgess of Columbia, on The American Presidential Election. There are also over two hundred pages of reports and summaries of the recent development of public law in various German states, Belgium, Denmark, Switzerland and Spain, by leading professors of public law.

A new edition (the fifth) of Juraschek's *Die Staaten Europas* has been published (Brünn: Leipzig und Wien). This is a very convenient handbook for the use of students, statesmen and men of affairs. It contains a vast amount of statistical and descriptive information regarding most of the states of the world, arranged under heads and subheads and often in comparative tables. Under the head of Criminal Statistics for example there are twenty-two pages of statistical and descriptive information which it would be difficult to find elsewhere in more accessible form. At the end of the volume is a bibliography of official and semi-official publications, mainly of a statistical character.

A volume both interesting and of practical value is *Die Staatsangehörigkeit der juristischen Personen*, by Ernst Isay, a German jurist (J. C. B. Mohr: Tübingen, 1907), being a study of the nationality of juristic creations. The author draws a comparison between them and natural persons from the standpoint of their legal rights and duties as subjects of the state and dwells upon the important part which they have come to play in the economic and legal life of civilized states. The author shows that many questions affecting their rights turn on the question of nationality, the establishment of which is the first step in the solution of the problem. He divides his work into two parts: in part one he considers in a general way the question of whether corporations may be subjects of the state and if so, what are the rules for determining their nationality; part two is devoted to an exposition of the legislation of the principal states of the world relative to these points.

Essai sur les emprunts d'États et la protection des porteurs de fonds d'États étrangers, by Albert Wuarin, a Swiss jurist and doctor of law (Larose et Tenin: Paris, 1907), is an instructive study of the legal

nature of state loans and of the rights of foreign creditors. He maintains that while the state can not free itself arbitrarily from its financial engagements it may nevertheless, if circumstances require, alter substantially the conditions of the contract. He examines the question whether a state, whose subjects are creditors of a foreign state, may intervene by force to compel the payment of debts due them and seems to incline to the view that such measures should not be resorted to.

Gesetz und Richter, by Dr. M. Rumpf, a German court assessor (Otto Liebmann: Berlin), is the title of a study which attempts to explain on a somewhat philosophical basis the principles governing the application of the law by the judge. He discusses the relation of the judge to the statute which he is called on to apply, the attitude which he should assume and the proper canons of interpretation for discovering the sense of the text. He argues that where the meaning is in doubt the judge should be governed mainly by the value or usefulness of the law in question. "The judge," he remarks "is not the slave of the law, he is an intermediary between it and life."

Four recent Italian monographs which may be of interest to the readers of this REVIEW are: *I cavi sottomarini e il telegrafo senza fili nel diritto di guerra* by Prof. Bruno Zuculin (Loescher and Company, Rome, 1907), being a study of the treatment of submarine cables and the use of the telegraph in time of war; *Verso la politica attuazione del principio di nazionalità*, by M. Ardnino (Vassallo: Turin, 1907), a defense of the principle of nationality in the creation, reorganization and administration of states; *Il diritto internazionale amministrativo e le grandi Unioni fra gli Stati*, by A. R. Mirabelli (Civellii: Rome, 1907), a consideration of the part which international administration unions have come to play in the relations of states and a discussion of the organization and functions of the principal unions; and *I presupposti filosofici della nozione del diritto* by G. del Vecchio (Zanichelli: Bologna) a philosophical study of the fundamental concepts of law.

Vergleichende Darstellung des deutschen und ausländischen Strafrechts is a series of studies in nine volumes, of about 500 pages each (Otto Liebmann: Berlin, 1907), compiled by a committee of German university professors appointed in 1902 with the concurrence of the ministry of justice for the purpose of preparing the ground for a thoroughgoing revision of the imperial criminal code. Each offense in the code is treated at length in its historical, scientific and legal aspects; the Ger-

man law in each case is compared with that of other countries and propositions for reform are advanced and critically discussed. It is a remarkable series of studies, prepared with characteristic German thoroughness and will doubtless exert an important influence on the solution of one of the great legal problems now confronting the empire. Readers of this REVIEW may be particularly interested in volume i which deals in a comprehensive manner with crimes against the state or against the authorities of the state—Hochverrat, Landesverrat and Majestätsbeleidigung. The authors of this volume are Professors Van Calker and Mayer of Strasburg and Dr. Gerland, a privat docent at Jena.

BOOK REVIEWS

The Budget in the American Commonwealths. By EUGENE E. AGGER, Ph.D. (New York: The Columbia University Press, The Macmillan Company, Agents. 1907. Pp. 218.)

Mr. Horace White, in his introduction to an English translation of Cossa's *Scienza delle finanze*, said in 1888: "A compilation of the tax systems of all the States would be interesting and valuable, but I would not advise anybody to undertake the task unless he has a great deal of unemployed time to dispose of." Aside from the pioneer work by Professor Ely, entitled *Taxation in American States and Cities*, published twenty years ago, and the study by Professor Seligman on *Finance Statistics of the American Commonwealths*,¹ published about the same period, scarcely anything of the nature of a general discussion of the finances of the American States has been attempted until recently. Professor Plehn has now achieved the task Mr. White was not eager to undertake, in his convenient digest of the revenue system of every State in the Union.² In his *Science of Finance*, Prof. H. C. Adams presented to American students an admirable account of budgets and budgetary legislation. His discussion, however, so far as the United States is concerned, is confined to a consideration of the federal financial system. The monograph by Ephraim D. Adams on *The Control of the Purse in the United States* is likewise limited to a treatment of federal finance. The lack of any thorough consideration of the budgets and financial legislation of the various State governments³ is now met in the volume by Dr. Agger.

The debt of the author to the work of Professor Adams was necessarily large and is freely acknowledged. In the order of presentation Dr.

¹ Publications of the American Statistical Association, 1889.

² Special Reports of the Census Office, Wealth, Debt and Taxation, 1907, pp. 615-826.

³ An Article by E. L. Bogart on Financial Procedure in the State legislatures in the *Annals of the American Academy of Political and Social Science* (1896), is not intended to be more than a brief sketch of the subject.

Agger follows Professor Adams, who himself admitted that in this respect there was "no room for original method in treatment."⁴

In his chapter on The Budget Right in American Commonwealths the author aims to confine himself to a discussion of the budget right, or the right of the people "to vote the taxes and the expenditures of the State," as it has been developed in our State governments. The well-established and long-recognized constitutional principles on which is based the right of the people to control the public purse are re-stated and this is followed by a section on the constitutional restraints on the exercise of the budget right. Among such restrictions treated are found those relating to public debt and public credit, legislative procedure, the tax rate, and the purposes for which taxes may be levied.

Chapter ii deals with the preparation of the budget, which, following the method of Professor Adams, considers the budget first as a report and secondly as a project of law. Dr. Agger's conclusion is that State budgets, considered as reports, are very unsatisfactory—the system followed being fundamentally at fault. The difficulty is that "nowhere in the States does an auditor or a comptroller exercise any real control over the estimates" (p. 51). Budgetary procedure in reality begins in the legislature, the finance committees are the real finance ministers. The legislators are apparently not guided at all by the wisdom and expert knowledge of administrative officers. This is, of course, generally recognized as a serious defect in American government; Professor Adams discusses it at length in relation to federal budgetary practice. Our cities, as Dr. Agger suggests, have been forced into a practice much more nearly in accord with the demands of theory. In the preparation of estimates for presentation to State legislatures the advice of experienced administrative officials has no weight with legislative committees. "There is a complacent self-sufficiency about the normal legislator which defies attack. He admits only with painful reluctance that anybody has qualifications superior to his own to judge of the essential wisdom of any particular course of action and especially in the matter of appropriations the idea that a mere official should have more authority than he is utterly repugnant and offensive to him. Therefore he will never consent to bind himself to the finance officer's estimate and almost uniformly certain considerations make it seem advisable to him to depart from them. * * *

A dozen examples could be adduced to show that our

⁴ *Science of Finance*, p. 117.

State legislatures, as a rule, pay no attention to the 'plans and recommendations' which they require from the finance officer" (pp. 54-55). No responsibility being given to administrative officers, the natural result is that none is felt. The law makers fail to secure the information necessary for intelligent action. Ill-advised legislation, carelessness and extravagance have consequently characterized our State finances. Dr. Agger is unable to entertain much hope for the future. There is no power to impose sounder methods on the States; nor is an increase in activities, such as has occurred in the case of municipalities, likely to make a reform imperative. Nevertheless it is possible, the author thinks, that the tendency toward a separation of State and local revenues whereby the States are assigned the changeable and less certain sources, may lead to the desired enhancement of the influence and authority of the chief financial officer of the State.

The remedy proposed is not exactly one which these criticisms would lead the reader to expect. To give the executive branch of State governments the influence it ought to have in financial matters, it is recommended that general responsibility for the preparation of estimates of expenditure to be presented to the legislature should be placed upon the governor. This is preferred to fixing responsibility on the auditor or comptroller, because this official is already burdened with other administrative duties, and because there is already manifest a tendency to hold the governor personally responsible. The comptroller or auditor is, moreover, usually elected and not answerable to the governor. It is recommended that under officers should not be allowed to appeal to the legislature over the governor's head. If, however, these suggestions should prove to be impracticable, the governor should be given veto power over items in the appropriation bill, which should be minutely itemized. The latter power, it should be noted, is already possessed by the governors of all but sixteen States. A budget prepared in this way would, it is hoped, carry much more weight of authority with the legislatures than the estimates as now drawn up.

A chapter on The Execution of the Budget, referred to by the author himself as "wearisome," is devoted to a detailed discussion of the assessment, equalization and collection of the chief kinds of taxes levied in the States. The general property tax is, of course, condemned as an "anachronism," although the author does not venture to discuss critically the theory of the several taxes referred to.

Sections on the centralization of revenue and the safekeeping and disbursement of funds are full of interesting detail as to methods in vogue

in various States. In a chapter on The Control of the Budget the "means employed for ensuring the honest execution of the budget" are thoroughly discussed. Here is touched the extremely vital problem of an efficient audit. With careful and honest auditing such frauds as those connected with the Pennsylvania State capitol could not have been perpetrated. The general criticism of our State systems is that the auditing power is not sufficiently independent of partisan politics. Apparently no good and sufficient reason can be advanced for this condition, for with ample provision for appeal to the legislature in most States there need be no fear of placing with the auditing authority a power too independent and arbitrary.

Dr. Agger has done a thorough and painstaking piece of work. The volume cannot fail to be one of value to students of public finance, as well as to those interested in the legislative and administrative methods of our State governments.

CHARLES C. WILLIAMSON.

Select Essays in Anglo-American Legal History. Compiled and Edited by a Committee of the Association of American Law Schools. Volume I. (Boston: Little, Brown and Company. Pp. 847. 1907.)

The appearance of this, the first of three volumes of selected essays dealing with Anglo-American legal history, is an event of considerable importance, marking as it does the interest which the associated law schools of this country have in the history of the subject which it is their province to teach. This historical interest is, in turn, an evidence of an increasing perception that the law is a subject which, for its proper comprehension, requires not simply a memorized knowledge of its present substantive principles and a working acquaintance with the actualities of its practice and procedure, but a philosophical appreciation of the principles upon which its specific principles are based. This philosophical appreciation, it is recognized, may be gained only by the employment of the comparative and historical methods.

The value of the comparative method is especially manifest in the field of legislation. Here, where the aim is the repeal or amendment of existing laws, or the enactment of new ones, a knowledge of the experience of other communities is practically indispensable. But if the comparative method is especially useful in the enactment of law, the his-

torical method is preëminently valuable in its explanation. Especially, of course, is this true as to the common or non-statutory law. Here the connotations of the terms employed are often so special, and the principles so qualified that an exact understanding of them demands a knowledge of the peculiar circumstances out of which they have arisen. In this way there is learned the special facts to which the rules have been applied, and the corresponding extensions and limitations of meanings which they have received. Thus, when the present time is reached, the principles appear not as abstract propositions but as completely interpreted in the history of the lives they have lived.

For legal instruction the historical method has merits to recommend it other than that of its interpretative efficiency. In the first place it is adapted to pedagogic use in that it proceeds from the simple to the complex. Principles are first disclosed in their elementary form, and their subsequent refinements gradually and logically explained. In the second place, it is a method by which the student is kept in constant contact with realities and thus his interest continuously maintained. The late Professor Thayer, addressing the American Bar Association in 1895, upon *The Teaching of English Law at Universities*, said: "I set down first in importance thorough historical and chronological exploration, because in this lies hidden the explanation of what is most troublesome in our law, and because in this is found the stimulus that most feeds the enthusiasm and enriches the thought and the instruction of the matter. The dullest subjects kindle when touched with the light of historical research, and the most recondite and technical fall into the order of common experience and rational thought."

More important, however, than even pedagogic merits is the value of legal history in giving to the student a knowledge of the law as a living developing force in the community. Its history shows that the great body of the laws of a country has its roots far back in the past, is closely interwoven and identified with the nation's institutions, and with the thought and life of the people—that legal principles are in fact, in most cases, the definition of the people's customary habits, and the crystallized statements of their deepest ethical ideals. Thus the doctrine is taught that while in a developing country, no specific laws are to be regarded as immutable, the entire legal *corpus* constitutes an organic whole, an alteration of one part of which is apt to affect other parts, and that, therefore, changes should be made in such a manner as to preserve, as far as possible, existing rights, and that, above all, these changes should correspond to real needs, and reflect the true ethical

consciousness of the whole people and not ephemeral conditions or the demands of some selfish or unenlightened class.

The historical treatment of the law is often spoken of as synonymous with the science of historical jurisprudence. There is, however, a very considerable difference between the two, both as to scope and aim. The tracing of the historical development of the various substantive provisions of a given system of law—how they have come into being, the legislative sources whence they have been derived, the influences which have conditioned their contents, the organs through which they have received interpretation and application—these are the subjects of research for the historian of the law. The aim of the student of historical jurisprudence is different. His task is to discover the origin and to trace the development of the abstract juridical ideas that have found, and still find, their expression in the legal thought of a people. With the exact forms in which at different times these abstract conceptions may have found statement, or with the particular applications to which they may have been put, he is not concerned. His whole interest is with the underlying notions of the law. Holland has correctly declared the aim of jurisprudence to be the setting forth and the explaining of “those comparatively few and simple ideas which underlie the infinite variety of legal rules;” that “jurisprudence deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations.” This being the aim and method of jurisprudence, historical jurisprudence must have for its province the tracing of the development of these abstract legal conceptions. Thus, to illustrate, the student of historical jurisprudence has first of all to discover and state the probable form in which the very idea of law first framed itself in the human mind, what theories were held as to its source, its sanction, its relation to religious dogma and to political command; next to learn how, through successive steps, the exact notion of a positive *jus civile* separated itself from the religious and ethical ideas with which it was at first associated. This done, the task is to take up, one after another, such elementary legal ideas as person, thing, act, event, property, contract, tort, crime, and the like, to show the definitions which they impliedly received in primitive law, and to trace their presence and varied meanings in the different stages of juridical thought. Thus, when this has been done for all the important notions involved in legal thinking, historical jurisprudence will exhibit the entire material of analytical legal thought clothed in historical garments.

The volume under review falls rather within the field of the history of

the law than within that of historical jurisprudence. It is composed of twenty-one selected essays, all of which, with the exception of one, have previously been published as essays, articles, or chapters of books. These essays are grouped under the title *General Surveys*, and sub-classified under the following heads: (1) Before the Norman Conquest, (2) From the Norman Conquest to the Eighteenth Century, (3) The American Colonial Period, (4) Expansion and Reform of the Law in the Nineteenth Century, (5) Bench and Bar from Norman Times to the Nineteenth Century.¹

In the two volumes which are to follow, essays, articles, and chapters dealing with the history of particular topics and divisions of the law are to be reprinted. The three volumes now announced are to deal only with the private law. All matters of public law, including the history of constitutional law and of municipal corporations are excluded. The possibility is intimated, however, that a later series may be made to include them, a possibility which it is sincerely 'to be hoped will be realized.

In the preface, the committee appointed by the president of the Association of American Law Schools to make the selection and prepare the volumes for publication, in explanation of the purpose of and need for

¹ The table of contents is the following:

Part I. Before the Norman Conquest—(1) Prologue to History of English Law, F. W. Maitland; (2) The Development of Teutonic Law, Edward Jenks; (3) English Law before the Norman Conquest, Sir F. Pollock.

Part II. From the Norman Conquest to the Eighteenth Century—(4) The Centralization of Norman Justice under Henry II, Alice Stopford (Mrs. John Richard) Green; (5) Edward I, the English Justinian, Edward Jenks; (6) English Law and Renaissance, Frederic William Maitland; (7) Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant, Thomas Edward Scrutton; (8) The History of the Canon Law in England, William Stubbs; (9) The Development of the Law Merchant, W. S. Holdsworth; (10) A Comparison of the History of Legal Development at Rome and in England, James Bryce.

Part III. The American Colonial Period—(11) English Common Law in the Early American Colonies, Paul Samuel Reinsch; (12) The Extension of English Statutes to the Plantations, St. George Leakin Sioussat; (13) The Influence of Colonial Conditions, as Illustrated in the Connecticut Intestacy Law, Charles McLean Andrews.

Part IV. Expansion and Reform of the Law in the Nineteenth Century—(14) Anticipations under the Commonwealth of Changes in the Law, R. Robinson; (15) Bentham's Influence in the Reforms of the Nineteenth Century, John Forrest Dillon; (16) Progress in the Administration of Justice during the Victorian Period, Charles Synge Christopher, Baron Bowen; (17) The Development of Jurisprudence during the Nineteenth Century, Joseph Henry Beale, Jr.; (18) The Extension of Roman and English Law throughout the World, James Bryce.

Part V. Bench and Bar from Norman Times to the Nineteenth Century—(19) The Five Ages of the Bench and Bar of England, John M. Zane; (20) A Century of English Judicature, Van Vechten Veeder; (21) An American Law Student a Hundred Years Ago, James Kent.

the work say: "The present state of our knowledge of the history of law may be likened to an unfinished building, whose foundations have been laid and whose frame and beams have been erected. The roof, the walls, the floors, the furnishing and decoration are yet lacking. Its scope and internal plan, its architecture and its relation of parts, can be already plainly seen. But it cannot yet be inhabited; and many kinds of workmen must labor upon it. These foundations are the volumes of Sir Frederick Pollock and Professor Maitland—resting upon the still deeper Germanic caissons of Prof. Heinrich Brunner and his co-workers. This frame and these cross-beams are, on the one hand, the few larger monographs, from Mr. Justice Holmes' *The Common Law*, and Professor Bigelow's *Anglo-Norman Procedure*, of thirty years ago, to the Selden Society's source books and Mr. Holdsworth's recent first volume; and, on the other hand, the more numerous essays and chapters of the author's represented in these present volumes. But, until now, most of these lesser structural members of the framework have lain scattered about upon the ground, here and there, ready for use, and yet not fully serviceable because not easily accessible and not assembled in their relations to each other and to the whole. It is the purpose of these volumes to assemble and make accessible these valuable parts of the structure of our legal history. * * * To the profession, then, and to all its members, whether in school or out of it, we commend this collection, in the hope that it may bring into general knowledge the main part of the historical achievements which are not yet contained in independent volumes, and that it may help to stimulate a deeper and wider knowledge of the present meaning of our law as seen in the light of the past."

Regarding the judgment with which the selection of material has been made, each must judge for himself, and each will probably find ground for disappointment that certain writings have not been included. The reviewer may only say for himself that, in his estimation, the selection has been a most discriminative one. The committee to whose disinterested work we are indebted for the volumes is composed of Prof. John H. Wigmore of Northwestern University (chairman), Ernst Freund of the University of Chicago, and William E. Mikell of the University of Pennsylvania.

W. W. WILLOUGHBY.

A *Treatise on the Law of Naturalization of the United States*. By FREDERICK VAN DYNE, LL.M., American Consul; formerly Assistant Solicitor of the Department of State of the United States. (Rochester: The Lawyers' Coöperative Publishing Company. 1907. Pp. xvii + 528.)

The recent legislation which has introduced notable reforms in our naturalization laws and their administration furnished the occasion for the appearance of this work which was prepared as a companion volume to the same author's treatise on *Citizenship of the United States*. It possesses the merits and defects which characterized the earlier work. Mr. Van Dyne's training and his service in the department of state have made him familiar with the numerous questions which have arisen respecting citizenship and naturalization, and have enabled him to speak authoritatively regarding legislative activity, executive precedents and judicial decisions in these fields.

The author presents in detail the provisions of the existing law respecting the normal method of naturalization including qualifications of applicants, courts authorized to naturalize, the several steps required in the process and the new administrative provisions which have been introduced since the enactment of the law of June 29, 1906. It is unfortunate that in treating the latter he fails to emphasize the absence of such provisions under former laws and does not clearly indicate the revolutionary character of the changes effected by the new methods. In many cases he contents himself with a bare statement of the statutory provision or administrative regulation. In some instances this leads him to overlook significant features. Thus while he points out the right given to the United States to appear in opposition to the naturalization of any person and indicates some of the methods which have been adopted for securing information upon which the government can proceed, he fails to note the fact that special assistant United States' district attorneys are provided to act as the representatives of the government in such cases. The naturalization act of 1906 did not make such provision but authority for the same was included in a paragraph of the sundry civil expenses appropriation act of 1907. The United States has been divided into a number of districts to each of which has been assigned one of these special assistant district attorneys. Moreover, each of these attorneys is provided with a number of traveling inspectors who visit different parts of the district for the purpose of personally investigating cases in which the documents submitted show

irregularities or matters requiring special investigation. Under this plan the administration of the law will be much more efficient than it would have been if left to the regular United States' district attorney who has so many other interests to consider. The method adopted is also interesting as an illustration of the growing tendency to regard efficient administration as of no less importance than legislation.

In other chapters Mr. Van Dyne deals with naturalization by naturalization of parent, naturalization by marriage, collective naturalization, passports, and expatriation, the latter being discussed with particular reference to the changes effected by the act of March 2, 1907. A final chapter, containing a compilation prepared by the department of state, showing the laws and regulations of foreign countries affecting their citizens who have become naturalized in the United States, might have been included in the appendix which contains among other information the statutes of the United States relating to naturalization, naturalization conventions to which the United States is a party and executive orders and naturalization regulations which have been issued in pursuance of the recent acts of congress.

While Mr. Van Dyne has brought together much valuable information, his manner of presentation and choice of material are not always satisfactory. In certain parts the work takes on the character of a legal digest and consists of a compilation of judicial decisions. In other cases he includes extensive quotations from judicial opinions. Thus forty-four pages are devoted to extracts from the opinion of the Spanish treaty claims commission (1905) in the cases of *Ruiz v. United States*. In other cases, despite the fact that all of the laws of the United States relating to naturalization are printed in the appendix, many sections of the statutes are given in full in the text and in more than a dozen cases are repeated on another page. Much of this is doubtless due to the fact that the volume is intended for use by clerks of courts having jurisdiction in naturalization proceedings but this will hardly justify the extent to which the repetition has been carried. Thus pp. 189-196, with the exception of one short paragraph, consist of sections of the revised statutes and acts of congress some being repeated on other pages and all appearing in the appendix. In one case a section of an act relating to Filipinos is given on p. 309 and is repeated twice on p. 131, once in the text and once in a footnote, while in another instance a section pertaining to the naturalization of Porto Ricans and Filipinos is given on p. 49 and repeated three times, on pp. 60, 63, and 122, respectively. Another manifest instance of unnecessary repetition occurs

in the case of the rules issued by the department of state governing the granting of passports to those who have merely declared their intention to become citizens of the United States. These regulations which cover three pages of the text, are printed on pp. 371-373 and are repeated on pp. 378-380. This may have been due to careless proofreading which appears also to be responsible for the errors in the topical analysis of chapter five which cause some confusion to the reader. It is unfortunate that these defects should appear in a work which possesses the merits of this volume.

ISIDOR LOEB.

Der Bundesstaatsbegriff in den Vereinigten Staaten von Amerika von ihrer Unabhängigkeit bis zum Kompromisse von 1850. Von DR. JUR. ERNST MOLL. (Zurich: Schulthess and Company. 1905. Pp. 209.)

This volume is the first part of a study designed to cover the development of the American theory of the federal State down to the present time. A careful and detailed examination is made of all the discussions regarding the nature of the American Union down to and including the theory of John C. Calhoun. The several steps in the advance of philosophical and constitutional theory are described with intelligence and accuracy, and illustrated by a wealth of references to the literature of the subject. Fully half of the volume, in fact, is made of detailed footnotes containing citations of materials, not all of which, however, seems to be of real importance. The volume is characterized rather by the faithfulness and thoroughness with which the detailed development is presented, than by discovery of new material or originality of interpretation.

The doctrines of Jefferson and Madison as expressed in the Kentucky and Virginia Resolutions occasion Dr. Moll a good deal of difficulty, particularly in view of the later attitude of these statesmen. The truth seems to be that the doctrine of compact so dominated the political thought of the time that no clear cut distinction existed between natural and constitutional rights of revolution, or resistance, or secession. Many of the States expressly declared in their constitutions that the right of revolution was reserved to all citizens and was in fact an inherent and inalienable right. The men of that day neither knew nor desired to know distinctions between the constitutional right and the natural right to resist what was regarded as oppressive conduct on the part of the government; and to seek any sharp distinctions of this character is to

search for what was not there. The declaration of the Kentucky Resolutions that "as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress," is clearly a restatement of Locke's doctrine of the right of revolution applied to the American Union. That "the co-states, recurring to their natural rights in cases not made federal will concur in declaring these acts void and of no force" is another illustration of the same influence.

Dr. Moll's identification of the theories of Jefferson and Calhoun ignores this important feature of the philosophy of the time. Jefferson's doctrine rested fundamentally on his democratic fear of and opposition to "consolidated government" as the foe of human liberty, and the form of his philosophy was an application of the *naturrecht* doctrine to the nature of the federal union. Calhoun repudiated the revolutionary political theory, and resting on the doctrine that a balance of interests is necessary to the preservation of a republic, and postulating the original and indivisible sovereignty of the States, worked out a constitutional theory of nullification and secession. What Jefferson regarded as a *natural* right, he considered as a clear *constitutional* right.

It is unfortunate that Dr. Moll did not have before him, in his discussion of the doctrine of Webster, the writings of Nathan Dane, whose statement of the nationalist theory of that day is important. The Story-Webster idea of a compact is exceedingly well expressed by Dane, when he says: "Parties may, in many cases, *incipiently* consent and so contract far enough to make a statute or law operate on, and bind in their case, and as soon as the statute or law takes effect, the consent and contract cease to be noticed. Take, for instance, the case of marriage, where a statute prescribes not only its form but also divorces as in Massachusetts. The parties must first consent and agree, submit and go through the statute forms, to put the statute in operation, and make it binding upon them; but the moment it takes effect, and binds the parties together, then the law alone is regarded, and their consent and agreement are no longer noticed." (*Abridgment and Digest of American Law*, vol. ix, apx.) It was this private law idea of a contract to form the federal Union, that lay at the basis of Webster's argument, and is the foundation of it but, that, Dr. Moll does not seem to have sufficiently appreciated.

In the second and forthcoming part of the study, Dr. Moll proposes to trace the development of the theory of the federal State from 1850 down to the present time, and to give a general summary of the movement.

C. E. MERRIAM.

The Rise and Growth of the Gerrymander. By ELMER C. GRIFFITH.
(Chicago: Scott, Foresman & Co. 1907. Pp. 124.)

This volume is a dissertation submitted in candidacy for the degree of doctor of philosophy at Chicago University. Its aim is to ascertain the origin of the gerrymander in the United States, and to trace it in State legislation down to the year 1840. The earlier and, from an historical standpoint, most important part of the work is carefully done, and shows conclusively that the gerrymander did not originate in 1812 when the word itself came into use, but can be traced far back in colonial history. The latter part of the work seems to be less exact and gives an impression of incompleteness.

As defined by the author, a gerrymander is "the formation of election districts * * * with boundaries arranged for partisan advantage." In his discussion he also includes "districting with a view to reduce the legitimate representation of a populous city or county." This last sort of gerrymander is not treated exhaustively for the period set, viz: to 1840, and the two sorts are so distinct in kind that a separate treatment of each would have made the argument more clear; the value of the work as a whole would certainly have been increased had all early instances of rural discrimination against urban centers been gathered under one head.

Incidentally the author pays special attention to the oft repeated charge that Madison's district for the congressional election of 1789 was gerrymandered. This charge he shows to be substantially untrue. The reference on p. 109 to the Connecticut convention of 1902 seems unnecessary, especially as the constitution submitted made few changes in districting and was rejected at the polls that same year.

The author also shows how the earlier States strove to remedy the evils of gerrymandering by amendments to their constitutions; and how the gerrymander which was at first "considered a political, civil, and moral injustice" came later to be deemed "as a political stratagem," which either party might use whenever the opportunity presented itself. He pays small attention to remedies for this evil; regulation through provisions in the constitution, election by general ticket, and some system of proportional representation, are mentioned as possibilities.

It is unfortunate that an index was not inserted for purposes of cross-reference, though this defect is in part remedied by a quite complete table of contents.

J. Q. DEALEY.

Commentaries on the Constitution of Pennsylvania. By THOMAS RAE BURN WHITE. (Philadelphia: T. and J. W. Johnson: 1907. Pp. xxvii + 618.)

Mr. White, who is a well-known member of the junior bar of Philadelphia and who has been a professor in the law department of the University of Pennsylvania, has made a most important and entertaining contribution to the study of comparative State constitutional law. Although he deals with the subject almost exclusively from the juridical point of view, his volume is none the less of very considerable value to the student of political science.

The Pennsylvania Constitution of 1874 was generally regarded as a reform instrument. It was drafted at a time when an awakened, but somewhat uneducated public opinion was demanding a change and the members of the convention endeavored to satisfy these requirements; none however with uniform success. It is true that the old method of special legislation was abolished, but the pendulum was forced so far to the other extreme that the courts have been busy ever since in seeking to modify and ameliorate the effect of article iii and its long list of subjects on which special legislation is inhibited.

That the evil the constitutional convention sought to remedy was a real and pressing one, may be gathered from the figures which one of its members presented for consideration. In 1866 there were passed 50 general laws and 1096 special laws; in 1867, 86 general laws and 1392 special ones; in 1868, 73 and 1150, respectively; in 1869, 77 and 1276; in 1870, 54 and 1276; in 1871, 81 and 1353; in 1872, 54 and 1232. In short in seven years the legislature passed 475 general laws and 8755 private acts. Because a power had been abused, however, there was no substantial reason why it should be abolished, but this was what the convention sought to do, or nearly so, and the result was one of the early examples of the transformation of a constitution from a simple, elastic frame of fundamental principles into an elaborate net-work of prohibitions, although the Pennsylvania instrument is a slight affair as compared with the more recent ones.

Mr. White's chapter on Local and Special Legislation is a full and on the whole, satisfactory summary of the subject, if we bear in mind that he deals with it as a lawyer and not as a political scientist. He shows how the supreme court, in the well known case of *Wheeler v. Philadelphia*, justified and defended classification as applied to cities and that irrespective of or notwithstanding that some of the classes contained

but a single city and for long years to come would contain but one; although the court has subsequently held that the classification must not be so rigid as to exclude "all not then answering the particular description." For example the supreme court would hold and has held a law applying to such cities of the first class as have at the date of its passage certain additional peculiarities to be invalid.

As giving some idea of the extent to which the courts have modified the prohibitions, we may quote a portion from Mr. White: "Class legislation, subject to the preceding limitations, has been sanctioned concerning boroughs, persons under physical disability, giving to them alone the right to peddle; * * * all persons, natural or artificial, engaged in the carrying trade; foreign insurance companies; * * * bridges over streams; all constables in the State; junk shops; minors under and over the age of sixteen years; * * * relating to surety bonds purchased from corporations as distinguished from those provided by natural persons."

As illustrating the limitations of Mr. White's volume from the political scientific point of view, one might cite this very chapter we have been considering. It is a clear and comprehensive discussion of what the constitution says and of what the courts have held it to mean, but it is brief almost to the vanishing point in its discussion of the underlying question of the success or failure of this particular effort to remedy the evils of special legislation and it is silent on the growing practice to pass a special act under the form and in the garb of a general law.

The limitations, however, it must be remembered are self-imposed by the author and in no wise interfere with its value to practicing attorneys and students of law for whom it is primarily intended.

The only other book on the present constitution of Pennsylvania is that of the Hon. Charles R. Buckalew, who was a member of the convention. It is a descriptive volume and only occasionally, and then but incidentally, interpretive. The two volumes complement each other.

Mr. White follows modern methods and so far as he is called upon to disclose his views, which is not often, he shows his sympathy with a broad and generous interpretation of the fundamental law so that its provisions may be adapted to new and changing conditions. While faithful at all times to the constitution, it is plain to be seen that he regards the common weal as of first consideration and not a school of thought or a method of construction.

While uniformly careful, there is a striking omission in the historical introduction, in that he fails to state that the constitution of 1790 was

promulgated by the convention and never formally approved by the people through their votes.

CLINTON ROGERS WOODRUFF.

Anglo-Chinese Commerce and Diplomacy: Mainly in the Nineteenth Century. By A. J. SARGENT, M.A. (Oxford: The Clarendon Press. 1907. Pp. xii + 332.)

"Political and commercial sagacity usually go together." This statement made by Von Schierband in his book on *America, Asia and the Pacific* (1904, p. 251), is accompanied by the remark that Great Britain reached the zenith of her political power in the middle of the last century, precisely at the time of her supremacy in trade and manufacture, and that since then she has virtually lived on her prestige. The present work goes far in supporting that view so far as it concerns the influence of Great Britain in China's affairs. Senator Beveridge in his recent book speaks of the "drugged and cocaine slumber" and the "sinful inactivity" of Great Britain in the whole of the Far East, although the particular inactivity complained of by him is that Great Britain had done nothing to impede the Russian advances toward a dominating commercial position in China. Recent events have changed the source of danger to British and American interests from Russia to Japan, and peculiarly enough, Russia has now played into the hands of Japan by a treaty, the terms of which have only recently come to light, pursuant to which the claim of the mikado's government is recognized to accept from Corea and Manchuria commercial concessions to which no other power, despite its right to treatment of the most favored nation, shall be entitled (see *North American Review*, February, 1908, p. 302).

Events in China are indeed kaleidoscopic and the importance of the present work is, therefore, mainly historical. It traces the diplomatic and commercial relations of England with China from the letter of Queen Elizabeth addressed to the emperor in 1596, down to the present day. The author has made careful search of original documents in the British foreign office and he has also referred to trade statistics deduced from the reports of the Chinese imperial maritime customs and the balance sheets of the East India Company. He has not always given the precise source of his information and when references are given, such as to diplomatic correspondence, he has neglected to refer to the volume and page at which the particular letter may be found. This practice is to

be deplored, especially as oftentimes only the year-date is given, accordingly readers will be prevented from citing the original sources as authorities.

To students of political science, the most interesting chapter is that relating to the development of "spheres of influence" (ch. ix, pp 226-247) from which it clearly appears that British diplomacy during the past three decades has been controlled largely by the policy of other powers, each seeking its own advantage at the expense of its competitors and of China. This policy has been well described by Lord Beresford as "taking what does not belong to us because other powers are doing the same." It had been amply proven that the "concert" does not work without friction when purely commercial interests are at stake and out of this failure grew the new policy of local predominance, pursued of course without any regard to the claim of China to rank as a sovereign power. The author warns against any delusion to the effect that the powers would refrain from applying this doctrine to the full, along with the economic policy of exclusion which they follow at some cost to themselves in Europe. He maintains that while there is a pause in the policy of territorial aggression in so far as China proper is concerned, more subtle methods of gaining control are being pursued with a greater energy (p. 239).

The more generous policy of Japan adopted after the treaty of Shimonoseki (1895) seems to be rapidly disappearing and her actions in Corea and Manchuria are doubtless causing the most acute attention in diplomatic circles. The Russian treaty already referred to, although not to become effective until the other powers assent, must be plain evidence even to friends of Japan, that her goal is preferential treatment in northeastern China. To prevent such a result, Great Britain has contented herself with a negative diplomacy, and a perusal of the present work confirms the statement made by others that she has lost commercial as well as diplomatic prestige. Thus, as Von Schierband points out in the work already cited, her supremacy in the whole of the Yang Tse valley, once a British sphere of influence, is gone and even her carrying trade has been diminished by sales to German lines of British steamers formerly plying in Asiatic waters.

The natural trend of British diplomacy from this time forth would seem to be toward maintaining the integrity of the Chinese Empire. Lord Charles Beresford in his preface to *The Break-up of China* goes as far as to say that this is "essential to the honor as well as the interests of the Anglo-Saxon race." The present author would seem to look for the accomplishment of this result only from within, through the growth

of a national sentiment resulting in administrative and financial reforms and the organization of a military force. The book closes with a veiled threat that as the Chinese never forget, the result "may not redound to the advantage of the western nations which have hitherto treated China as an uncivilized region to be exploited for the sole benefit of the self-elected exponents of the ideas and methods of European civilization."

ARTHUR K. KUHN.

True and False Democracy. By NICHOLAS MURRAY BUTLER, President of Columbia University. (New York: The Macmillan Company. 1907. Pp. xii + 101.)

The Citizen's Part in Government. By ELIHU ROOT, Secretary of State. (New York: Charles Scribner's Sons. 1907. Pp. 123.)

Political Problems of American Development. By ALBERT SHAW. (New York: The Columbia University Press. 1907. Pp. vi + 268.)

"The difficulties of democracy are the opportunities of education." More clearly than ever before, it is coming to be seen that the development of both intelligence and character among the whole people is the task which education must essay in any democracy that is not doomed to failure, and that a heavy responsibility for leadership, in the performance of this task, must be assumed by our colleges and universities. The day is past when college graduates upon the commencement stage debate such themes as "whether the going back of the shadow upon the dial of Hezekiah was universal?" (Harvard, August 24, 1769). The graduates of today discourse upon primary elections, the restriction of immigration and the control of the trusts.

That the problems of citizenship should be brought home more directly to the men who are privileged to enjoy a university education is evidenced by three books of the past year, all dealing with phases of the citizen's relations to the government. Each of these books reprints addresses before academic audiences; in two cases the lectures were upon special foundations established for the purpose of ensuring the effective presentation of these themes before the students of two great universities. College students are indeed fortunate when they can hear the problems of American citizenship discussed by men who are in the foremost ranks of statesmen, educators and journalists. In each presentation there are distinct indications of the speaker's special angle of vision.

All of these books are optimistic in tone, though President Butler's forecast is not without serious misgivings. "In the whole field of popular government," says Secretary Root, "I am convinced that one of the plainest duties of citizenship is hopefulness, and that pessimism is criminal weakness," and his chapter on "the grounds for encouragement" is an admirable setting forth of the evidences of the progress which the past fifty years have brought in the attaining of higher ethical standards both in business and in politics. In reading the proof of his book, Dr. Shaw was apparently somewhat startled by the stalwartness of his own optimism, for he closes his preface with the acknowledgment: "Some readers may find in the book a measure of hopeful confidence in the character and future of American democracy that current facts might seem to them not to warrant." Nevertheless, he asserts that the "views expressed are mature and deliberate," with whatever topic they deal. The frequent recurrence of such phrases as "transitional period," and "passing phases" in connection with the most disquieting facts in regard to such problems as that of the currency, of race antagonisms and of the control of the railways and trusts, soon leads the reader to attribute this unshakable optimism in large measure to temperament. To him, present evil in American government is, at the worst, but good in the making.

Each of these three writers frankly recognizes the serviceableness and practical necessity of political parties for the shaping, controlling and expressing of public opinion, and emphasizes the fact that political activity can ordinarily be made effective only through the agency of party, so that withdrawal from one's party "ought to be an unusual and abnormal act," "never taken without due regard for a sense of proportion and after careful weighing of the probable influence of the act upon remote as well as upon immediate ends."

Of the three books President Butler's is by far the most academic, both in view-point and in treatment. It comprises three addresses: True and False Democracy (University of California, 1907), Education of Public Opinion (University of Michigan, 1899), and Democracy and Education (National Educational Association, 1896). His quest for "true democracy" is in the theories of idealists, mostly of an earlier generation, rather than in the institutions which are growing up about him: "democrats" will search his index in vain for any mention of "primary" or "referendum." Mazzini's definition of democracy is the one which he accepts: "the progress of all through all, under the leadership of the best and the wisest." "Least of all," he holds, "can

a democracy hope to succeed without an *elite* of its own, * * * recruited from talent or capacity for public service." Burke's words to the electors of Bristol set forth his theory of real representation; he shows no faith that political salvation is to be attained by means of legislative automatons, pulled by the wires of initiative and referendum. The proposition upon which he lays chief stress, recurring to it in each of his addresses, is that liberty and equality (other than the political equality incident to liberty) are fundamentally incompatible. "Destroy inequality of talent and capacity, and life as we know it stops. Democracy becomes unthinkable. The corner-stone of democracy is natural inequality, its ideal is the selection of the most fit. Liberty is far more precious than equality, and the two are mutually destructive." He inveighs against "socialism, which would wreck the world's efficiency for the purpose of redistributing the world's discontent."

In his four lectures before the students of Yale University upon the W. E. Dodge foundation, Secretary Root discussed the following themes: The Task Inherited or Assumed by Members of the Governing Body in a Democracy, The Function of Political Parties as Agencies of the Governing Body, The Duties of the Citizen as a Member of a Political Party, and The Grounds for Encouragement. All these addresses are tonic in precept, and receive powerful emphasis from the speaker's own example. Participation in the effort to make popular government a success, he lays down as a peremptory obligation, which can not be avoided by any intelligent man who has any understanding of the conditions under which he lives—an obligation which is exactly proportioned to his equipment for effective action. In addressing college students it was well to insist that "the citizen's duty will not be fulfilled merely by playing the rôle of a critical observer of what others do. * * * To criticise is not to do. * * * For the generality of us whose knowledge and insight are not much, if any, superior to those of the great body of our fellows, it is wise to wait until we have at least greater experience than they have in the things we undertake to talk about, before we try to play the schoolmaster to them." He emphasizes the broadening and humbling influences which political associations bring to the individual, and insists that, despite the many abuses of party power and party management, the American who feels the responsibility of his citizenship can do his duty as a part of the governing people better by entering into the organization of one of the great political parties than in any other way. The very existence of evils resulting from the usurpation of party control by mere office-trading combinations, "presents a

manifest and urgent duty to the conscience and patriotism of every competent American" to aid in doing away with such usurpation.

In contrast with these other addresses, Dr. Shaw's lectures, upon the George Blumenthal foundation, before the students of Columbia University, are devoted to exposition and analysis rather than to exhortation. His topics are as follows: Nature and Meaning of our Political Life, Problems of Population and Citizenship, Immigration and Race Questions, Settlement and Use of the National Domain, The Citizen and his Part in Politics, Party Machinery and Democratic Expression, Control of Railways and Trusts, Problems of Tariff and Money, Problems of Foreign Policy and Expansion. Upon several of these topics, the reader will look in vain elsewhere for an equally succinct and comprehensive treatment. The book, however, is to be taken as a single essay or dissertation upon the theme: "the struggle of the American people to realize national unity upon the basis of a homogeneous and well-conditioned democracy."

The writer's attitude throughout is that of the opportunist. "Statesmanship is a matter of compromise and expediency. The difference between right and wrong in public policies is not so much a matter of abstract ethics as it is a matter of the Gregorian calendar. It is not so much *what* should be done in politics as *how* to do it, and, above all, *when* to do it." His belief in the essentiality of homogeneity to a democracy leads him to the prohibition of the slave trade (1808) as "the most important of all the public acts in the history of this country, from the standpoint of constructive policy in the development of our citizenship." This, alone, he thinks prevented an importation of slaves which would have resulted in the white population's being vastly outnumbered by the negro, throughout all the lower south. Similar reasoning leads him to the opinion that "the Chinese exclusion act was of inestimable importance from the standpoint of our original American purpose to create and maintain a great unified nationality," since without that law "it is wholly probable that by this time the Chinese would have outnumbered the white population of our States west of the Rocky Mountains."

One of the most comprehensive and serviceable chapters is that devoted to problems relating to the settlement and use of the national domain. The laws by which the federal government has sought to open up the public domain to actual settlers are well summarized. In the sectional differences of economic condition brought about by our rapid western movement is found the source of currency and banking

problems, which have played so striking a part in American politics—problems which in European countries are relegated to experts. Early mistakes in dealing with the arid lands are pointed out, the policy which allowed coal and mineral lands to fall into private hands is deplored, and hearty approval is given to the new reclamation acts and the forest reservations.

In discussing the franchise, Dr. Shaw lightly dismisses the question of woman's suffrage as one "of experimental detail." Entirely disregarding the adoption of educational qualifications for the suffrage in other northern States, he asserts that "the exclusion of illiterates in Massachusetts represents fastidiousness rather than important statesmanship," a statement which to the reviewer seems true neither as to the origin nor as to the retention of that test. With the wholesale disfranchisement of the negroes at the South, by the application of such tests, he has no quarrel.

The chapter most likely to arouse dissent is the one which deals with problems of foreign policy, international relationships and the extension of sovereignty. Its tone may be judged by the following exposition of the Monroe Doctrine: "As it has grown, it may be termed an expression of the feeling of the people of the United States about the conditions and destinies of the western hemisphere, as a whole, made influential by concrete tests. It does not pledge us to any line of action in a given case, and it is not inconsistent with any line of policy we may choose to adopt in our relations with other parts of the world." But what concerns Dr. Shaw most in this chapter is our relations with the country to the north of us. Again and again he condemns the "blindness and fatuity" of our public men in "preferring a lawsuit to collect damages for Confederate inroads upon our commerce" rather than "accept as a free gift those vast and noble regions which now comprise Manitoba, British Columbia, the intervening province of Alberta, the great wheat-growing country called Saskatchewan, and the mineral wealth of the Yukon." He asserts—footnotes citing authorities would be of value—that, "not to stop there, Great Britain was quite willing to go to the final length and give its consent to our annexation of the Maritime Provinces, Upper and Lower Canada, and Newfoundland," and that "annexation would have been welcome to them." On the contrary, Mr Rhodes (*History of the United States from the Compromise of 1850*, vol vi, ii, pp. 354–355), quotes the British minister's reply to Fish's urging upon him the withdrawal of Great Britain from Canada: "Oh you know that we cannot do. The Canadians find fault with me for

saying so openly that we are ready to let them go whenever they shall wish, but they do not desire it." The same historian adds: "Fish saw clearly the *insurmountable obstacle* to our possession of Canada, the Canadians preferred the government of Great Britain to our own, Like the wise diplomat he was, he then dropped the unattainable."

Dr. Shaw's elastic interpretation of the Monroe Doctrine serves as the basis for a forecast which Canadians will read with interest: "From the standpoint of the development of our policy, * * * Canada must cut loose from European political ties and accept full responsibility as a member of the family of nations, or else merge her political destinies with ours. * * * It was a fundamental error of the most dangerous kind for Canada to send troops to South Africa, and thus take a voluntary part in the war of a great empire against two minute republics. * * * Nothing could be more fundamentally contrary to the policy under which we tolerate the political separateness of the country north of us, than the habit of participation in European, Asiatic and African wars."

GEORGE H. HAYNES.

The Reconstruction Period: The History of North America. Volume XVI. By PETER JOSEPH HAMILTON. (Philadelphia: George Barrie and Sons, N. D. Pp. xxi + 571.)

It is a pleasure to review this book as it almost touches the high water mark in reconstruction literature. The style, if not brilliant, is at least easy and pleasing, perhaps slightly above the average in historical works. Nor is the work a mere narration of facts, for an attempt is made to get at the ideals back of reconstruction and the resistance to it.

It is refreshing to find at last a southern historian who has the courage to say that slavery was the cause of the war. It is still more refreshing to find one who does not burden his pages with recriminations, hurling back at those who love to dwell on the enormities of slavery and the heinousness of secession a double return for the immorality and criminality of reconstruction. However, this is already growing rare. Putting all such aside, Mr. Hamilton has entered upon his task with the equanimity, one is tempted to say, of a visitor from another realm who was unacquainted with the bitterness engendered by long continued party strife. Partisanship has been thrust aside in the effort to get at the philosophic basis of the events described. The whole story is aptly

summed up as a "Tenth crusade, an attempt to force upon the old southern States * * * new ideals whose realization involved a complete change in State, church, family and industry." But not the south alone was affected by reconstruction. In carrying out her crusade the north also had to undergo changes. In recognizing this fact Mr. Hamilton has made an advance over some of his predecessors.

The introduction is an excellent statement of the problem and this is followed by a picture of the main theatre, the prostrate south. Then come several chapters devoted to presidential, southern, and congressional reconstruction, followed by others on the military rule and carpet-bag régime. If little that is new has been brought out on this phase of reconstruction, the treatment is fresh and clear. The misgovernment and corruption of the carpet-bag régime are not painted in such lurid hues as some writers have given to them, but they stand out in all their nakedness and it is made clear that they were the inevitable consequences of the radical program. The chapter on race tendencies throws considerable light on this last question. The author here fetches his argument from afar, Africa, and describes the condition of the negro in his original home, the changes wrought by slavery and emancipation, and finally his attempt at "grand larceny of civilization." This phrase is so striking that it seems almost to deserve to live, but it hardly expresses with exactness the author's meaning. Larceny implies the appropriation of another's goods. In his raid upon the white man's civilization, however, it looked for a time as if the negro would utterly destroy it.

Owing to the complete separation of state and church in this country it is easy for historians to overlook the importance of the latter as an historical force. In spite of, or perhaps we should say because of, this separation, religion has been and still is a powerful factor in our national life. Yet, just as some historians overlook the significant division of the churches before political secession was attempted, they also neglect the reconstruction of the churches, or in some cases the failure to reconstruct them along old lines. Mr. Hamilton has wisely followed the trail blazed out by Professor Fleming and devoted a chapter to this subject. He also devotes one each to reconstruction in the border States and at the north.

The author has made no attempt to write a history of the United States for this period. Events outside the south are dealt with only so far as they relate to that section. For this reason the chapter on reconstruction at the north is a little disappointing. Indeed, it is just at this point that the reader feels that Mr. Hamilton has narrowly missed

writing a great book. Reconstruction was a national, not a purely sectional matter. Confusion has arisen because the greatest readjustment had to be made at the south and the most dramatic incidents occurred there, but the nation itself was being transformed and the events in the two sections were not wholly unconnected, even when no connection appears on the surface. For example, corruption was not peculiar to the south, but was very common in the north also. Was there no fundamental cause underlying it in both sections and was there no connection between the moral revolt of the north at the corruption in its midst and its sufferance of the overthrow of the carpet-bag governments in the south? A fuller treatment of this subject is much to be desired.

The least satisfactory part of the work relating to the south is that dealing with economic reconstruction, of which one might reasonably have expected a fuller treatment.

The author explains the absence of footnotes by stating that the plan of the work, for which apparently he was not responsible, did not admit of them. Probably the same cause explains the absence of an index. No doubt the last volume of the series will contain one, but a special one is desirable for such a volume as this.

With such an excellent text one can hardly believe that the author is altogether responsible for the illustrations, most of which have little or no connection with the text where they appear and some of which have practically none with any part of it. If pictures of Stephen A. Douglas and Thomas H. Benton and the room in which Jefferson Davis died must be included, why leave out Mount Vernon and Thomas Jefferson and John C. Calhoun? The last named certainly did no little to make civil war and reconstruction inevitable.

DAVID Y. THOMAS.

Problems of International Practice and Diplomacy with Special Reference to the Hague Conference and Conventions and other General International Agreements. By SIR THOMAS BARCLAY. (London: Sweet and Maxwell, Ltd; Boston: Boston Book Company. 1907. Pp. xix + 383.)

This book, the product of an eminent European jurist is an exhibition of international law in the making. The title of the work, without considerable explanation, offers little clew to its nature and form. It is not

a systematic treatise, but is a series of memoranda or notes issued from time to time for the consideration of the members of the Institute of International Law, and of various departments of the British and other governments. In the selection of topics to be included in the series of notes now published, the author's object, as stated by himself, has been to single out those cases in which states have attempted by direct and conscious effort to promote the growth of a spirit of law and order, "and to endeavor to isolate the ethical principles or reasons of expediency which seems to have underlain their application, and to utilize them for the solution of other kindred problems." Again he says, "I have left a certain number of controverted questions untouched, the volume being confined to matters which seem ripe enough to be brought before the second Hague or other international conferences, or to be otherwise dealt with by diplomacy."

In form the volume consists of twenty-six notes on various controverted points in international law, and seventeen suggested draft treaties, or clauses of treaties which are described by the author as "mere endeavors to indicate with precision and in detail the contractual form the international regulation of different matters of international practice might take." There is also an appendix containing the full text in English of the Hague conventions and declarations of 1899, the revised Geneva convention of 1906, and other documents having an important bearing on international relations.

The importance of this volume does not lie in its statement or interpretation of existing value of international law, but rather in its learned author's opinions as to what the future rules are to be or ought to be. A considerable number of topics are treated, the most important of which are international arbitration and the jurisdiction and procedure of the Hague court, the immunity of private property at sea from capture, the revision of the rules of neutrality, the definition of contraband, the employment of force in the collection of contractual debts, and the establishment of an international prize court.

In his treatment of the subject of international arbitration, Sir Thomas points out that the Hague convention of 1899 is defective in that it provides only for voluntary arbitration. While he recognizes the worth of what has been accomplished by that convention, he holds that a treaty of arbitration which shall "completely fulfill its purpose of avoiding any breach in the amicable relations between states, must be, at the same time, general, obligatory, and automatic." Nowhere have the essen-

tials of such a treaty been more cogently set forth than in these sentences:

"It must be general, because its purpose may be defeated if, when the crisis comes, one or the other party can dispute the applicability of the treaty to the matter at issue.

"It must be obligatory, because if it is not, a treaty of submission must be negotiated at the worst possible moment for negotiations, namely, at a moment when the state of national feeling may threaten to suspend negotiations altogether.

"For the same reason it must be automatic."

This statement of the characteristics which such a treaty must have, shows how far we are from the goal of universal arbitration. On the other hand, the bubble of "national honor," which has so often defeated projects of arbitration, is thus neatly pricked:

"'National honor' is very like a vital interest, but it generally arises out of the overheated discussion of some question which was originally a judicial one. Every question can become one of national honor in the hands of an unskilled diplomacy, and very often what is called national honor is merely a one-sided view of a question in which honor plays very little part."

The mind of the man of affairs who must deal with realities rather than with theories is displayed in his conclusion that "it does not much detract from the value of the new treaties that there is a loophole offered by which either nation can escape, in any particular emergency, from their obligations. Treaties between nations cannot be viewed in exactly the same light as contracts between individuals. The best sanction they have is the sense of honor and justice of the contracting parties, and it can be argued that it will always be better to escape from a treaty through its own provisions than by violating its provisions." If writers and speakers would recognize that international relations, in general, cannot be judged by the rules that apply to the relations of individuals, much fallacious argument would be avoided.

In his treatment of the vexed question of contraband, Sir Thomas attempts to avoid the difficulties arising from the present lack of any international agreement as to what constitutes contraband by the abolition of conditional contraband and the adoption of the British practice of preemption. He submits a draft treaty on this point, which, while not removing all the difficulties involved in the determination of contraband, would yet greatly simplify the process.

Closely related to the subject of contraband is the exemption of private

property at sea from capture. Ever since such immunity was advocated by Franklin in 1783, it has been an article of faith with American statesmen to attempt to secure its adoption. Made the basis of our refusal to accept the declaration of Paris in 1856, embodied in our treaty with Italy in 1871, urged upon congress by several presidents (although in the case of President McKinley not acted upon when he had an opportunity to apply it), and presented to both the Hague conferences by the American delegation, this has come to be looked upon as a peculiarly American doctrine. At the second Hague conference, four maritime powers—Great Britain, France, Russia, and Japan—opposed its adoption. While national self-interest doubtless had much to do with their opposition, the principle itself presents inherent difficulties which American statesmen and jurists have been too prone to overlook. It is generally urged that private property at sea should be assimilated to private property on land, under the impression, apparently, that the latter is exempt from capture. This is of course a mistake, for although rules regulating such captures have been formulated, the tendency of such rules, as Sir Thomas observes, “is obviously not to arrive at immunity, but to develop an organized system by which damage and losses to individuals, whom the fortune of war has brought into immediate contact with the enemy, are spread over the whole community.”

The proposal to prohibit the use of force for the enforcement of contractual obligations is viewed with little favor by Sir Thomas. His conclusion is that “it is probably safer to leave each case to be dealt with in accordance with its particular requirements.” Yet the Hague conference of 1907 succeeded in adopting a modified form of the Drago doctrine.

One of the achievements of the second Hague conference which has been viewed with most satisfaction is the adoption of a convention providing for an international prize court. To Sir Thomas' mind, however, this probably does not appear to be a very substantial gain. He admits that the defeated party in a prize case would probably be more willing to accept his defeat at the hands of a neutral tribunal than at the hands of a court of his enemy, but he doubts whether more substantial justice could be obtained in the one than in the other. “The question,” he says, “is whether the neutrals might not be as much subject to bias against the belligerent States as the judges of belligerent states are assumed to be biased at present against neutral powers. The check of a specially interested belligerent public opinion would obviously be less effective than that of a general neutral opinion in the reverse case. It would not make much difference that the neutral judges were of dif-

ferent countries, as the neutral interest is in principle homogeneous. In an international court, in fact, the only difference would possibly be that the bias instead of being against the neutral would be against the belligerent."

Every student of international law is under obligations to Sir Thomas Barclay for the publication of these notes, throughout which the wide learning, the keen judgment and lucid statement which have given him such fame as a jurist are conspicuous. But a single blemish appears—the application, perhaps inadvertent, to the present head of the German Empire of the title "Emperor of Germany."

LAWRENCE B. EVANS.

International Commercial Policies, with Special Reference to the United States. By GEORGE MYGATT FISK, Ph.D. (New York: The Macmillan Company. 1907. Pp. xvi + 288.)

This book constitutes a unit in the series known as the Citizen's Library of Economics, Politics and Sociology. The appearance of a volume such as this, is indicative of an attitude of inquiry into the technical aspects of international commerce which only recently has come to prevail in this country.

The Germans have led the way in the field of study of international commercial politics. The scholarly works of Roscher, Cohn, Lexis, van der Borcht and Grunzel may be accepted as the leading authorities and the author has made use of their investigations to some extent. The present work is evidently intended as a text book for commercial schools and for preparatory consular training. It contains a brief history of the commercial policies of the ancient and modern world, expounds the theory and practice of customs, imposts, a résumé of the most important commercial treaties, describes the aims and workings of public, quasi-public and private trade-promoting institutions and outlines the methods and purposes of commercial statistics.

Much of the material is necessarily elementary. Furthermore, in view of the fact that the commercial policies pursued in the various countries during particular epochs are based upon economic theories then prevailing, considerable space is devoted to a discussion of these basic theories. The various phases of mercantilism are outlined and criticised, and a chapter each is devoted to the doctrines underlying the commercial policies of free trade and protection. The author has ably summarized

the doctrines of leading economists and briefly sets forth their arguments. Pursuing a policy only too common in high school text books of the present day, the author has put much of the material in summary form. The arguments in favor of protection are grouped under five heads, viz: National Independence, Infant Industry, Vested Interests, Home Market and Pauper Labor (pp. 15-51).

More than half of the book is devoted to a discussion of customs duties, the preponderating attention being of course given to the American tariff system (pp. 62-142). Commercial treaties, reciprocity and the most favored nation clause are discussed under two separate chapters (pp. 145-176). Some of the author's statements upon legal subjects contain inaccuracies of greater or less importance; thus for example on p. 149, it is said that the question whether a treaty involving a change of revenue laws must have the sanction of both houses of congress has never been judicially passed upon by the supreme court. An examination of cases which the author himself cites under the heading Suggestive Topics will show that the question has been sufficiently answered in the affirmative by the supreme court; at least by implication (see *Whitney v. Robertson*, 124, U. S. 190, cited by the author upon a different question on p. 159 and *Bartram v. Robertson*, 122, U. S. 166, cited under bibliography on p. 153). Again (pp. 234-235) in discussing navigation politics and the rule of international law recognizing national sovereign rights over the high seas to a distance of one league from shore, the author remarks that "the practical effect of this principle has been largely nullified in recent years by the increased range of weapons of war." What was intended was evidently quite the reverse, namely, that international sovereign rights over the littoral sea tend to become more extensive under modern conditions.

The latter part of the book is a valuable compendium of information relating to the workings of the American consular system under recent legislation and the private and official agencies at work for the extension of our foreign commerce. Here a comparison with the methods employed in other countries, more especially in Great Britain and Germany, would have been valuable. We note also an absence of material relating to past and present commercial policies for the development of trade with China.

The bibliographies and special references appended to each chapter are extensive and form a valuable feature of the book.

ARTHUR K. KUHN.

The Investments of Life Insurance Companies. By LESTER W. ZARTMAN, Ph.D., instructor in insurance, Yale University. (New York: Henry Holt and Company. 1906. Pp. iv + 259.)

Dr. Zartman's contribution to the literature of insurance was begun in 1903 while a graduate student at the University of Illinois, was completed while a fellow at Yale and was accepted as a thesis for the doctorate at that institution in 1906; afterwards it was prepared for publication and now appears in its present form, a compact book of substantial appearance with numerous references to the sources and an adequate index. Unlike the major portion of the recent literature on the subject it is not a hasty compilation hurried together to meet the unexpected demand for ready information, but a well considered, orderly and scholarly work upon a subject that lies at the very heart of the present day insurance problem. Furthermore, the work is an excellent example of what may be accomplished by the application of scientific, economic, and statistical methods to any of the practical business subjects. It may therefore serve not only as an incentive to other similar investigations but as a pattern that with modifications necessitated by particular conditions may be followed in other practical fields until there shall have been created a body of scientific literature in every line of modern business.

From the scientific point of view, the three chapters dealing at length with the character, the earnings and the cost of insurance investments constitute its most important contribution to insurance literature. The changes in the character of investments from decade to decade are presented statistically and an attempt is made to discover the causes to which these changes are due. On the whole it is found that neither the economic nor political forces occupy the first place. Probably it is not particularly strange that "The personal element has entered largely into the character of the assets which a company purchases. A half century ago the majority of insurance assets was in mortgage loans; today such investments takes a second place, corporation securities, bonds and stocks occupying the place of honor. Thus in 1860, fifty-nine and two hundredths per cent of all insurance assets were invested in mortgage loans, while in 1900 twenty-eight and eight hundredths were so invested; on the other hand in 1860 investments in corporation securities were so small as to be practicably negligible, only three and two hundredths per cent, while in 1900 they had increased to thirty-seven and seven hundredths per cent. The character of the investments of individual

companies are not given in the work. If, however, one consults the reports of the various States where the individual investments are presented in full the statement quoted above from the book will be substantiated. Thus some invest chiefly in mortgage loans, others in securities, others in loans on policies, others in real estate, still others have their investments widely scattered over the several fields. On the whole the earnings for a series of years seems to have been fully as satisfactory from mortgage loans, even crediting to the companies the considerable appreciation from the rise in value of securities during the last few years. If we should take the company that is perhaps the leading example of those that invest heavily in bonds and compare with the leading company that has made a specialty of investments in real estate mortgages the result is as follows:

Year	Company	Investments	Earnings	Cost	Net Earnings
1904	Union Central	80% mtgs.	6.50	.59	5.91
1904	N. Y. Life	70% bonds	4.02	.38	3.64

It would not be fair of course to draw conclusions from a single comparison; since many other factors beside the kind of investments affect the net earnings. Yet the fact ought not to be overlooked that if one selects the half dozen companies that have maintained the highest rate of earnings for the past decade it will be found that a majority of the companies have invested more largely than the average in real estate mortgages.

It must be confessed that the practical lessons to be drawn from these investigations are disappointing. It may properly be urged that a study which has analyzed the character of the investments of the leading insurance companies in the United States and which further has applied a scientific test to determine their respective earning power ought to be able to point out certain principles that might very wisely be followed in the future by the several companies. It will be remembered however, that the investments analyzed have been made quite largely as the result at least of personal inclination and without that strict attention to economic conditions that was to have been expected. Moreover the primary purpose of the book was undoubtedly to point out methods of testing investments which may be applied with the expectation of obtaining valuable results whenever assets are invested upon strictly economic grounds. When that period in our insurance history is reached and the exact methods developed in Dr. Zartman's book

applied by the several insurance companies to their various classes of assets a marked improvement in earning power of those companies whose assets are returning less than the average return ought to be realized.

The second part of the book which deals with the legislative regulation of insurance companies and their control of assets together with the political effects of the accumulation of assets in various forms and in geographical localities is of much greater practical importance at the present time and ought certainly to have a pronounced effect upon the character of future legislation. An examination of the character of the insurance legislation enacted by the several States shows the following general tendencies of the very greatest significance.

First: There has been a general tendency to increase the scope and severity of restrictive legislation and at the same time relatively to weaken the policy early established of regulation through publicity. Some of the restrictive legislation is shown to have accomplished desirable results but on the whole it is evident to one who reads carefully and at the same time has observed the effects of this policy that at best it must be denominated a mistaken one.

Second: There has been a marked tendency for the laws of the several States to become more and more uniform, that is, to approach a common type. This has been accomplished in some cases by the abolition of extreme acts by the more radical States and in other cases by the introduction of more stringent legislation by others; and,

Third: There has been gradually but universally developed the policy of using the power of regulation over the insurance companies for the benefit or the supposed benefit of the particular State which is enacting the legislation; this is manifested in two ways, in the first case it is provided that a certain portion of the assets shall be invested in the State in question or in some cases in a particular form of investment which for certain reasons the State or its citizens wish to take advantage of; in the second case it is generally provided that some exceptional advantage shall be reaped by the State through the taxation of foreign insurance companies. This goes so far in certain instances as to constitute excessively burdensome taxation of the policy holders; in most cases, double taxation, and in practically all cases a system of discriminatory taxation in favor of the home companies and against all foreign companies.

The first and third of the tendencies are preponderantly bad, the second is good so far as uniformity is concerned but it must be acknowl-

edged that uniformity is being reached by a mistaken road. While the States have been following out the lines above mentioned they have quite generally neglected those saner methods of regulation which the situation has demanded. The control of the mutual companies and with that of the rapidly growing assets has been permitted to remain in the hands of various cliques year after year and nothing has been done to improve the methods of election and thus make the companies in fact what they are in name, viz., mutual in the best sense of the word. Directors have calmly abdicated their authority in favor of the active management and no attempt has been made to establish and enforce that degree of directors' responsibility which has been maintained in other fields of corporate enterprise. In fact the whole policy of our State legislators has been directed toward treating symptoms rather than the causes and in the mean time securing a liberal share of the fees for the benefit of the State treasury.

Dr. Zartman's attitude toward legislative regulation has evidently been influenced largely by the results of the legislative policy which he has been studying. He believes in securing representative boards of directors who really direct and holding them legally responsible for their acts with considerable freedom in the actual working out of their policies. And if his views are sound, it is apparent that much of the legislation of the past year is unwise and will fail to accomplish the results so much hoped for by all policy holders. In the light of past experience it is evident that unless the several States speedily change their policy and adopt a more rational one both in regard to regulation and taxation the sentiment will grow so strong in favor of federal regulation that some method will be found of securing that much desired end.

MAURICE H. ROBINSON.

Canadian Constitutional Development: Shown by Selected Speeches and Dispatches, with Introductions and Explanatory Notes. By H. E. EGERTON, M.A. and W. L. GRANT, M.A. (London: John Murray. Pp. xxii + 472.)

Not even English constitutional history since the American Revolution is so full of vivid interest as the constitutional history of the British North American colonies from the treaty of Paris of 1763 to the creation of the Dominion of Canada in 1867. In England so much of constitutional import had been settled before the American Revolution. At the

revolution of 1688 the position of the sovereign had been determined; and between then and the American Revolution the cabinet had been established and its relations to the crown and to parliament had been largely settled. After the American Revolution constitutional history in England is chiefly concerned with the several reforms which have been made in the electoral system and with the modernizing of county and municipal government. The constitutional history of Canada since 1763 includes much more than this. It is concerned with the establishment of local government in the provinces of Quebec, Ontario, New Brunswick, Nova Scotia and Prince Edward Island; with the relations of these colonies to the home government; with the union of Quebec and Ontario with the establishment of responsible government; with the sweeping changes in the fiscal relations of the British North American colonies to the mother country after England, in 1846, had adopted free trade and put an end to the old colonial system; and finally with confederation in 1867, and the new relations of the provinces to each other and of the Dominion to the British Empire.

These are some of the phases of constitutional development in British North America in the century which lies between the treaty of Paris and confederation; and it is as an aid to the study of this period of full, interesting and rapid constitutional development that Messrs. Egerton and Grant have collected and edited these speeches and dispatches. Great discrimination has been shown in the collection of the material, and equal care has been given to the editing—to the brief but ample introductory chapters and to the footnotes.

The volume fitly opens with the instructions which were given in December, 1763, to General James Murray, who had been in command at Quebec since the autumn of 1859. There are over eighty paragraphs in these instructions, each paragraph setting out some detail of the scheme of civil government that was then established and that was maintained until the Quebec act was passed by parliament at Westminster in 1774. The debates in the house of commons on this act are given with much fullness from the shorthand notes of Sir Henry Cavendish, who from 1768 to 1774 was member for Lostwithiel. Seventy years ago Cavendish's notes were transcribed and edited by John Wright, who was associated with Cobbett in the production of the parliamentary history and parliamentary debates. But Wright's edition of the Cavendish notes is now among the rare books, and a good service has been done for students of constitutional history by the full reproduction of these reports of the debates on the Quebec act. The correspondence between Quebec

and London that preceded the constitutional act of 1791—the act which divided Quebec and Ontario into two provinces—is also of much value not only in its constitutional aspect, but as supplementing Dr. W. B. Munro's admirable monograph on the *Seigniorial System in Canada*, especially as regards the political status of the habitants and their relations to the priests.

Lord Durham's report on the condition of Canada in 1837–38 is not in Messrs. Egerton and Grant's collection. It was unnecessary for it to be there, for it has so recently been reprinted in its entirety. But many of the letters that Durham wrote to Glenelg, the colonial secretary, are included; and so is the answer which the united empire royalists of Ontario made to Durham's report. This is one of the most remarkable documents in the collection, expressing as it does the Bourbon toryism of the united empire loyalists, and their dread of a government in Ontario responsible to the people of the province and holding power only so long as it was supported by a majority in the popularly-elected chamber. The letters and speeches which belong to the controversy, that preceded the granting of responsible government, form a large part of the collection. The annexation manifesto of 1849 is reproduced in full, and except for four pages which have reference to the tariff of the united provinces of 1859, the remainder of the volume is given up to the debates and negotiations which preceded the confederation of 1867.

The work of the editors has been so well done and its usefulness to students is so obvious that it creates a desire for more; and more that is of nearly equal value will be found ready to hand when the editors prepare their next edition of the work or determine upon a second volume. This is especially so as regards the era in which Canada secured her fiscal freedom. In the present volume, as has been stated, the editors devote only four pages to this subject and reproduce but in part the letters of Sir Edmund Head, who was then governor-general, and of Sir A. T. Galt, who was at that time minister of finance of the united provinces. This correspondence is of 1859, the year following that in which Canada first asserted her fiscal freedom by imposing protective duties on manufactures imported from Great Britain. But this era began in 1846, and for an adequate understanding of it a student should be in possession of the letters of Gladstone, who was then colonial secretary in Peel's administration—the letters in which he announced the freedom which the Canadian colonies were henceforward to enjoy, consequent upon the adoption of free trade in England, and the ending of the system under which there were tariff preferences at

British ports for lumber, grain and flour from the British colonies. Sir Francis Hincks's correspondence of 1851 with the committee on foreign affairs of the house of representatives, when as inspector-general or minister of finance he was in Washington in the interest of a reciprocity treaty, also belongs to this period, and serves to elucidate the full significance of Canada's fiscal freedom. After the correspondence of 1859, which Messrs. Egerton and Grant have quoted, there were protests in parliament at Westminster against the use to which Canada was putting this new freedom. These protests went on from 1860 to 1887. Some of them belong to a later period than that with which Messrs. Egerton and Grant are concerned. Many of the most vigorous came after the adoption of the national policy by Macdonald and the conservatives in 1879. But there is not one of the protests that is without its value to a due understanding of the fiscal relations between Canada and Great Britain.

The newspaper press in its constitutional aspects is not noticed in Messrs. Egerton and Grant's volume. This is an omission that will need remedying. The case of Hill and Doak, editors of the *Loyalist*, of Fredericton v. Weldon, the sergeant-at-arms of the house of assembly of the New Brunswick legislature, heard in 1845 at Fredericton, was for all colonial legislatures as important as the famous conflict between the house of commons and the printers of the *Gazetteer* and *New Daily Advertiser* and the *Middlesex Journal* of 1771.

EDWARD PORRITT.

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